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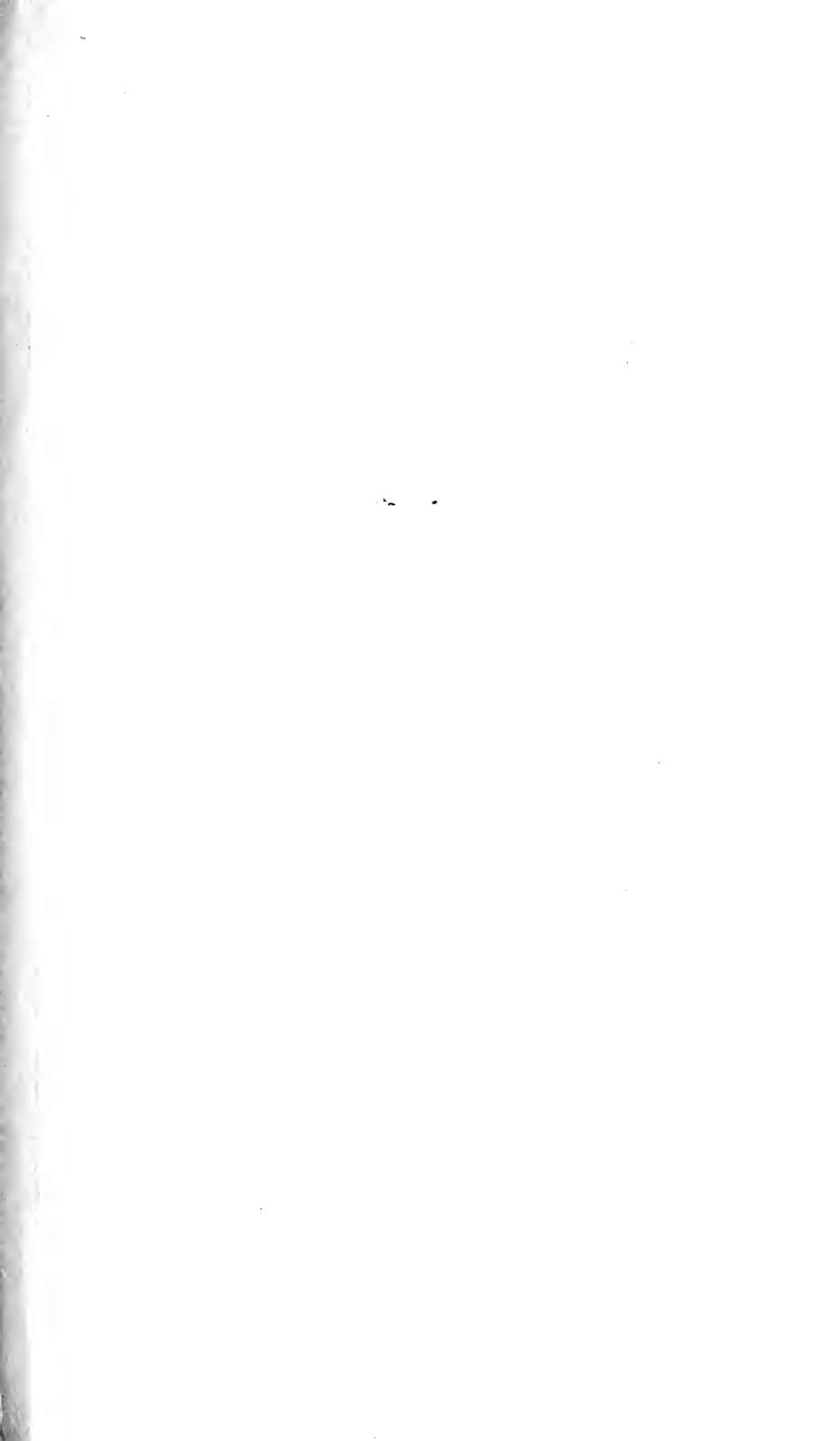
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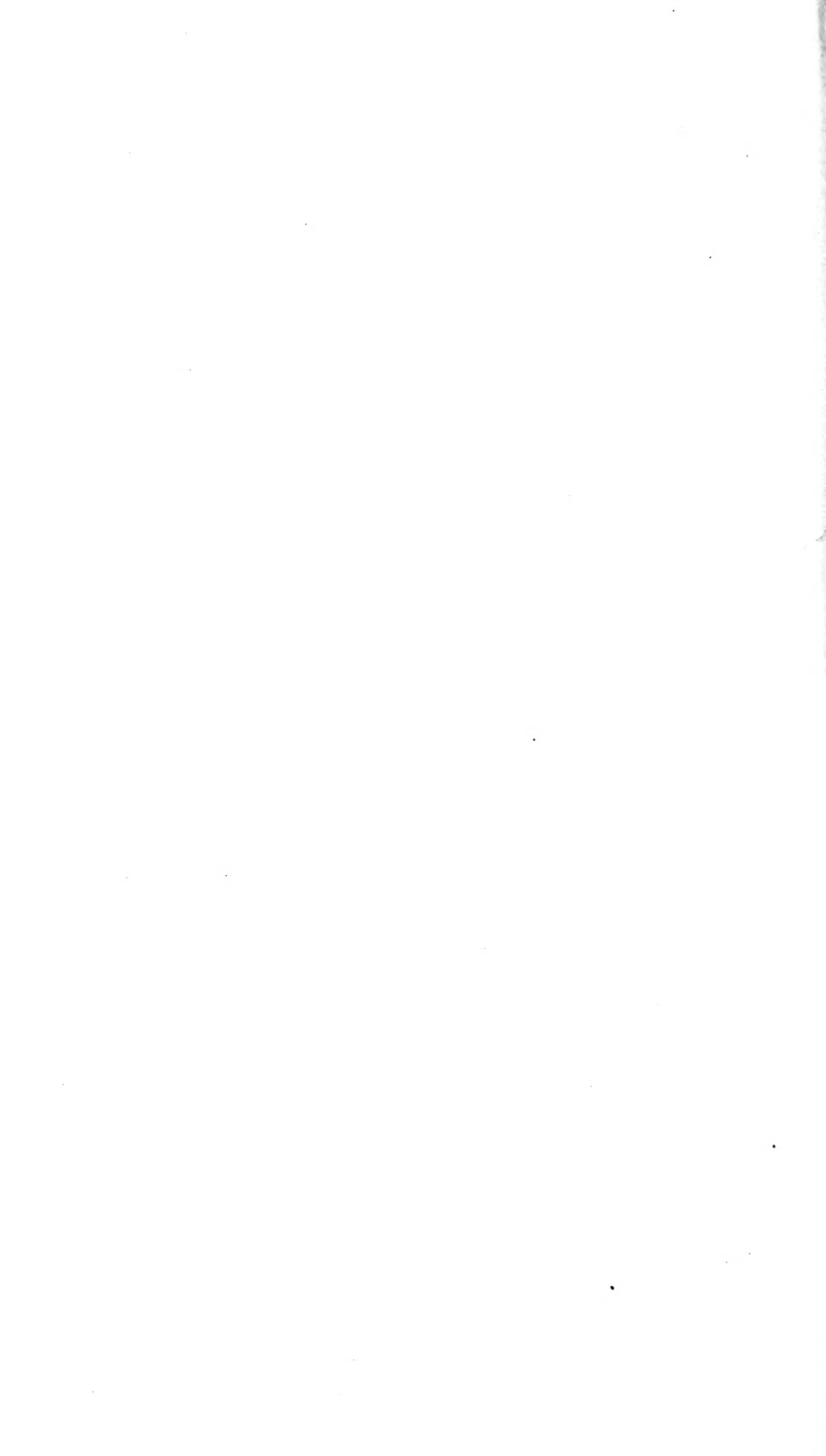
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2569
No. 12154

United States
Court of Appeals

for the Ninth Circuit

WILLIAM R. McCOMB, Administrator of the
Wage and Hour Division, United States De-
partment of Labor,

Appellant,

vs.

ROW RIVER LUMBER COMPANY, a Corpora-
tion,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED
APR 15 1949

PAUL R. O'BRIEN,
CLERK



No. 12154

United States
Court of Appeals

for the Ninth Circuit

WILLIAM R. McCOMB, Administrator of the
Wage and Hour Division, United States De-
partment of Labor,

Appellant,

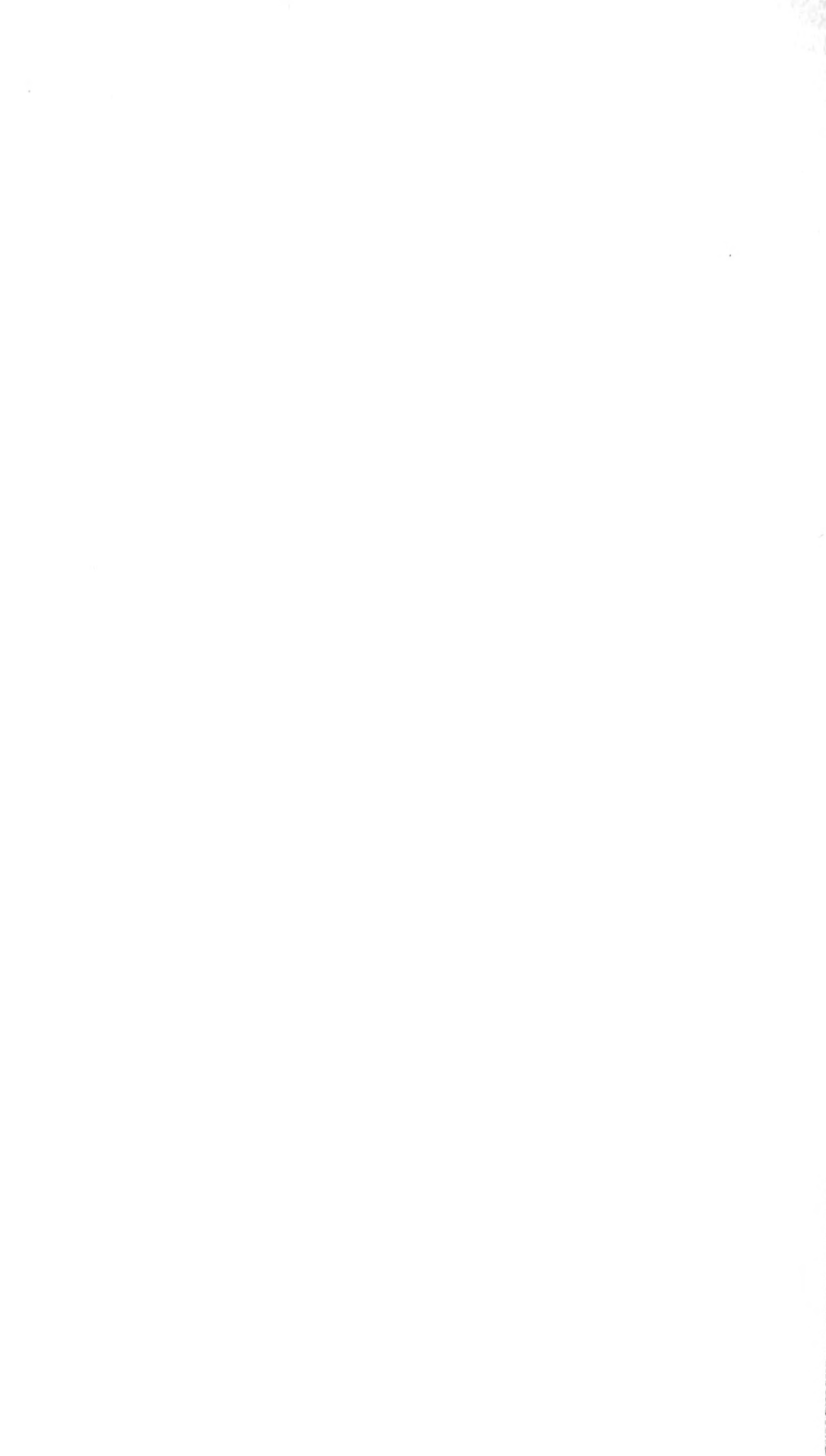
vs.

ROW RIVER LUMBER COMPANY, a Corpora-
tion,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | PAGE |
|---|------|
| Answer | 7 |
| Appeal: | |
| Certificate of Clerk to Transcript of Record on | 27 |
| Designation of Record on (DC) | 18 |
| Designation of Record on (USCA) | 236 |
| Notice of | 17 |
| Order as to Original Exhibits on 22 | 239 |
| Statement of Points on (DC) | 20 |
| Statement of Points on (USCA) | 235 |
| Stipulation as to Original Exhibits on 21 | 238 |
| Bill of Particulars | 6 |
| Certificate of Clerk to Transcript of Record on Appeal | 27 |
| Complaint | 2 |
| Designation of Record on Appeal: | |
| Appellant's (DC) | 18 |
| Appellant's (USCA) | 236 |

| | PAGE |
|---|----------|
| Docket Entries | 24 |
| Findings of Fact and Conclusions of Law..... | 9 |
| Judgment | 15 |
| Memorandum Opinion | 8 |
| Names and Addresses of Attorneys..... | 1 |
| Notice of Appeal..... | 17 |
| Opinion, Memorandum | 8 |
| Order as to Original Exhibits..... | 22 |
| Order as to Original Exhibits (USCA)..... | 239 |
| Statement of Points on Appeal: | |
| Appellant's (DC) | 20 |
| Appellant's (USCA) | 235 |
| Stipulation as to Original Exhibits (DC)..... | 21 |
| Stipulation as to Original Exhibits (USCA)... | 238 |
| Transcript of Testimony and Proceedings..... | 28 |
| Exhibits for Plaintiff: | |
| 1—Plaintiff's Interrogatories | 41 |
| 2—Defendant's Answers to Interrogatories | 48 |
| 7—Memorandum in re Cash received by Mrs. Edith LeCompte..... | 149 |
| Witnesses for Plaintiff: | |
| Bebe, H. B. | |
| —direct | 32 |
| —cross | 102 |
| —redirect | 109, 116 |
| —recross | 115 |

Witnesses for Plaintiff—(Contd.)

Cooper, Margaret

| | |
|---------------|-----|
| —direct | 183 |
| —cross | 185 |

Garoutte, Mrs. Ida

| | |
|-----------------|----------|
| —direct | 165, 169 |
| —cross | 179 |
| —redirect | 181 |

Hayes, Edmund

| | |
|---------------|----------|
| —direct | 202 |
| —cross | 227, 229 |

Lancaster, John A.

| | |
|-----------------|-----|
| —direct | 195 |
| —cross | 198 |
| —redirect | 200 |
| —recross | 201 |

LeCompte, Mrs. Edith

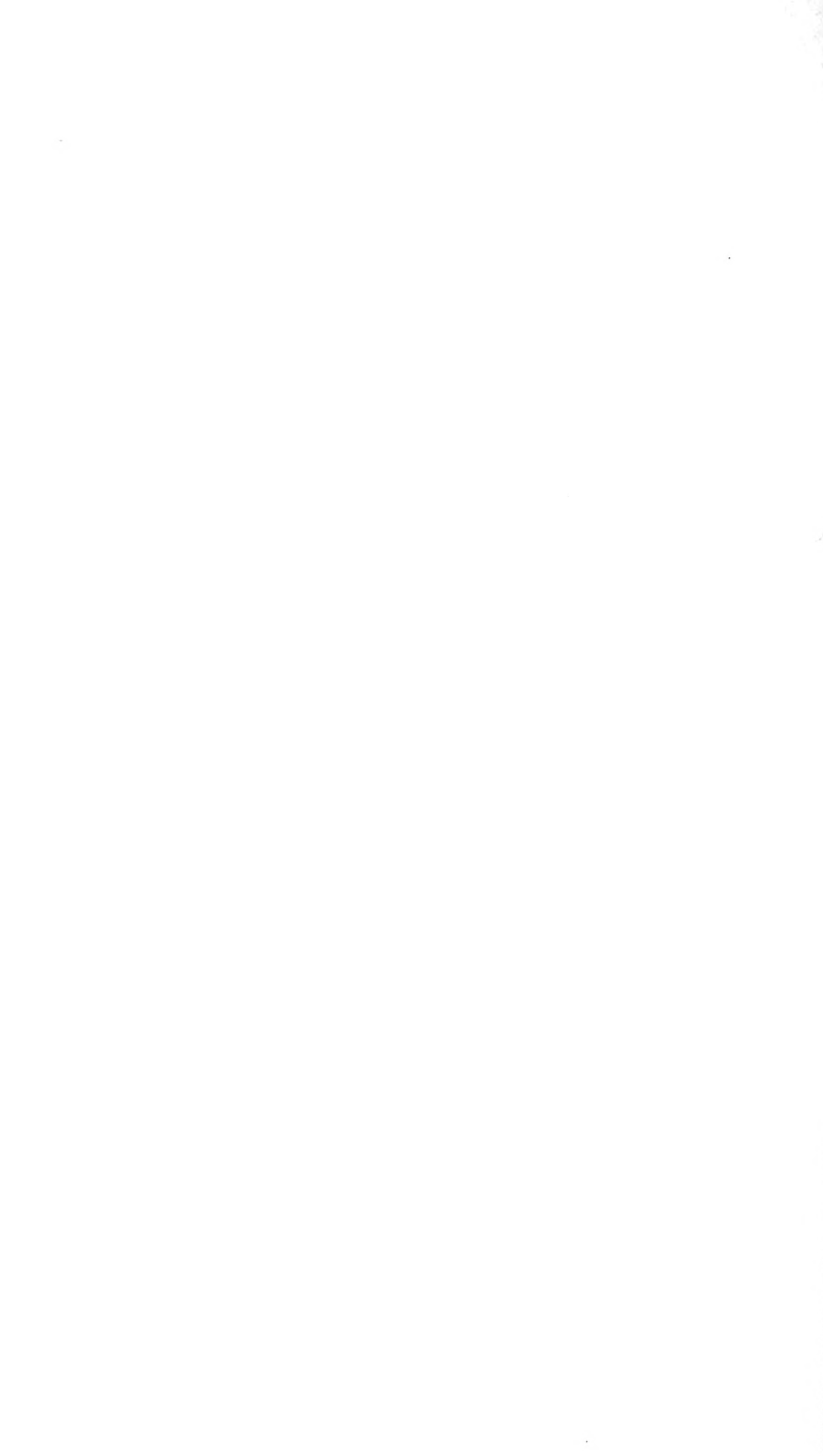
| | |
|-------------------------|-----|
| —direct | 116 |
| —cross | 153 |
| —redirect | 158 |
| —recalled, direct | 232 |

McCormick, Frances

| | |
|---------------|-----|
| —direct | 186 |
|---------------|-----|

Shoberg, C. J.

| | |
|-----------------|-----|
| —direct | 190 |
| —cross | 192 |
| —redirect | 194 |



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In the District Court of the United States
for the District of Oregon

Civil Action—File No. 3917

WILLIAM R. McCOMB, Administrator of the
Wage and Hour Division, United States De-
partment of Labor,

Plaintiff,

vs.

ROW RIVER LUMBER COMPANY, a corpo-
ration,

Defendant.

COMPLAINT

I.

Plaintiff brings this action to enjoin defendant from violating the provisions of Section 15(a) (1), 15(a) (2), and 15(a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201), hereinafter called the Act.

II.

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III.

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Oregon, having its principal office and a place of business at 823 Terminal Sales Building, Portland, Oregon, and a saw and planing mill at approximately six

miles southeast of Dorena, in Lane County, State of Oregon, within the jurisdiction [1*] of this Court, and is, and at all times hereinafter mentioned was, engaged at said saw and planing mill in the production, sale and distribution of logs, rough green and planed lumber.

IV.

At all times hereinafter mentioned, defendant employed and is employing approximately 98 employees in and about its saw and planing mill in Lane County, Oregon, in the production of logs, rough green and planed lumber, and in processes or occupations necessary to such production. Substantial quantities of the goods produced by these employees have been, and are being, produced for interstate commerce and have been, and are being, shipped, delivered, transported, offered for transportation, and sold in interstate commerce from defendant's said place of business to other states, and shipped, delivered or sold from defendant's said place of business with knowledge that shipment, delivery or sale thereof in interstate commerce to other states is intended.

V.

Defendant repeatedly has violated and is violating the provisions of Sections 7 and 15(a) (2) of the Act by employing some of its employees in the production of goods for interstate commerce, as aforesaid, for work weeks longer than 40 hours during the period since October 21, 1942, without compensating these employees for their employment

in excess of 40 hours, in work weeks during such period, at rates not less than one and one-half times the regular rate at which they were employed.

VI.

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and [2] amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII.

Defendant, an employer subject to the provisions of the Act, repeatedly has violated and is violating the provisions of Sections 11(c) and 15(a) (5) of the Act, in that since October 21, 1942, it has failed to make, keep, and preserve adequate and accurate records of its employees and the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the said regulations, in that the records kept by defendant failed to show adequately and accurately, among other things, the hours worked each workday and each workweek,

the regular rate of pay, the basis upon which wages are paid, the total straight-time earnings for each workweek, and the total weekly overtime excess compensation with respect to some of its employees.

VIII.

Defendant repeatedly has violated and is violating the provisions of Section 15(a) (1) of the Act in that, since October 21, 1942, it has shipped, delivered, transported, offered for transportation, and sold in interstate commerce from defendant's said place of business to other states, and has shipped, delivered, or sold from defendant's said place of business with knowledge that shipment, delivery or sale thereof in interstate commerce to other states is intended, goods in the production of which some of its employees were employed in violation of Section 7 of the Act, as alleged.

IX.

Defendant has, since October 21, 1942, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act. [3]

Wherefore, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defendant, its officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Sections 15(a) (1), 15(a)

(2), and 15(a) (5) of the Act, and such other and further relief as may be necessary and appropriate.

/s/ WILLIAM S. TYSON,
Solicitor.

/s/ HERMAN MARX,
Acting Regional Attorney.

/s/ JAMES F. SCOTT,
Senior Attorney.

United States Department of Labor, Attorneys for
Plaintiff.

/s/ HENRY L. HESS,
United States Attorney.

[Endorsed]: Filed September 30, 1947. [4]

[Title of District Court and Cause.]

BILL OF PARTICULARS

In accordance with the stipulation entered into by the parties to this action by their respective attorneys, plaintiff hereby voluntarily furnishes defendant with the following bill of particulars:

1. The class of employees referred to in the complaint with respect to whom the plaintiff alleges that the Fair Labor Standards Act of 1938 has been violated, are individuals employed in the cookhouse and kitchen, and consists of Ida Garoutte, Edith LeCompte, Margaret Cooper, Edith Ponton, and Shirley Ratcliff.

2. In the event that during the trial of this action it appears that additional employees not now

known to plaintiff were employed by defendant as cookhouse and kitchen personnel, in violation of the said Act, plaintiff reserves the right to serve an amended bill of particulars as to the names of such other employees.

/s/ WILLIAM S. TYSON,
Solicitor.

/s/ HERMAN MARX,
Regional Attorney.

/s/ JAMES F. SCOTT,
Senior Attorney, United States Department of
Labor, Attorneys for Plaintiff.

[Endorsed]: Filed October 20, 1947. [5]

[Title of District Court and Cause.]

ANSWER

Defendant, for its answer to the complaint herein, admits, denies, and alleges as follows:

I.

Admits all of the allegations of Paragraph I, except that it denies that it has violated or is violating any of the provisions of the Fair Labor Standards Act of 1938.

II.

Admits all of the allegations of Paragraphs II, III, and IV.

III.

Denies all of the allegations of Paragraph V.

IV.

Admits all of the allegations of Paragraph VI.

V.

Denies all of the allegations of Paragraphs VII, VIII, and IX.

Defendant specifically denies that the persons named in plaintiff's bill of particulars herein are or were its employees.

Wherefore, defendant demands judgment dismissing the complaint herein and awarding to the defendant its costs and disbursements.

/s/ CARL E. DAVIDSON,
/s/ CHARLES P. DUFFY,
Attorneys for Defendant.

Due service of the within Answer is hereby acknowledged this 20th day of October, 1947, at Portland, Oregon.

/s/ FLOYD D. HAMILTON,
Attorney for Plaintiff.

[Endorsed]: Filed October 20, 1947. [6]

[Title of District Court and Cause.]

MEMORANDUM OPINION

There is a catch in this case. Merely by designating as salary what is now called profit, the defendant could put the cookhouse manager beyond the purview of the Act, as an executive or administrative employee. Thus by an exercise in semantics,

what appeared to be unlawful becomes lawful. On such a dubious fact situation it does not seem that equity should be called on to exercise the extraordinary power of jurisdiction.

Dated June 15, 1948.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 15, 1948. [7]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial without a jury before the Honorable Claude McCulloch on March 4 and 5, 1948, at Portland, Oregon, the plaintiff being represented by Mr. James F. Scott of the Office of the Solicitor, United States Department of Labor, and the defendant being represented by Messrs. Carl E. Davidson and Charles P. Duffy; whereupon testimony and evidence having been introduced on behalf of the parties at the trial, oral argument having been duly had, and written briefs having been filed and considered; and the Court, having rendered its decision on June 15, 1948, and being fully advised in the premises, makes and adopts the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The plaintiff instituted this action to enjoin the defendant from violating the provisions of Sec-

tions 15(a) (1), 15(a) (2), and 15(a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, Stat. 1060, 29 U. S. C., sec. 201 et seq.); hereinafter called the Act.

2. The defendant is an Oregon corporation with its principal office located at 823 Terminal Sales Building, Portland, [8] Oregon, and a saw and planing mill located about 13 miles from Cottage Grove, Oregon, where it employs an average of 167 employees in the production of lumber, substantially all of which is sold and shipped in interstate commerce.

3. The defendant's saw and planing mill, together with its mill office, mill pond, loading dock and railroad track, bunkhouse and cookhouse, are located on a 35-acre tract of land which is taxed as a single unit and is all under the over-all supervision of Mr. H. B. Bebe, mill superintendent. The mill contains all the physical properties and equipment for producing lumber, including the cookhouse and equipment, which are a part of the integrated unit of production.

4. The cookhouse was remodeled by the defendant during the period from September to December, 1942, from a bunkhouse it owned so as to provide a place for defendant's employees to obtain meals. Defendant has borne the entire cost of remodeling, maintaining and repairing the cookhouse, and of furnishing and replacing all equipment used therein, which out-of-pocket capital investment amounts to \$3,806.30. Defendant pays the operating expense for water, electricity and fuel used in its cookhouse,

which amounted to \$348.11 in 1947, and also furnishes lodging to the cook and helper, which facilities were valued at \$480.00 during 1947.

5. The cook is retained under an oral agreement which has no definite time to run and can be ended by either party without notice. The only permanency of the relation of the cook to the company is that so long as it is mutually satisfactory, the agreement will continue.

6. The premises and equipment of the defendant are used for the work. The cook has no investment in any facilities or equipment. The cook purchases the food, and the one helper whom the cook has at any one time is selected and paid by the cook.

7. The employees are charged a fixed price per meal, [9] which price has gradually been increased by the defendant and the cook from 40 to 60 cents and is deducted by the defendant from the employees' wages and is paid by the defendant to the cook. Also, defendant pays the cook an additional subsidy for each meal served employees, the amount of which subsidy has been increased by the defendant from 10 to 15 cents and is paid by the defendant out of its own funds. The defendant pays the subsidy even if it is unable to make the payroll deductions from the employees' wages. The defendant also pays the subsidy on meals served to employees of independent contractors with defendant.

8. The purpose of the subsidy, which amounted to \$2,853.30 during 1947, is twofold: First, to pay part of the operating expenses of the cookhouse, and

second, the defendant competes with mills located in Cottage Grove, Oregon, for labor and it is necessary that the defendant offer reasonably priced meals as an inducement to attract and retain employees to work at its mill.

9. The defendant and the cook fixed the price of employees' meals and the cook never deviates therefrom. While the matter is discussed with the cook when increases have been made, the final determination is made by defendant's president, Mr. Edmund Hayes, and the cook agrees to his action.

10. The cook devotes her full time to working for the defendant. While thus engaged she does not hold herself out to other mills as being in the market to cook for them.

11. The nature of the cook's work requires no particular instructions. However, such supervision as is necessary has been exercised by defendant. Mr. Bebe keeps in touch with the cookhouse and eats there each week and makes it a point to observe its operation. He has the right to give any necessary or appropriate instructions and would exercise that supervision when required. In case of a difference of opinion with the cook, Mr. Bebe would expect the cook to comply with what he asked her to do. If the cook's services are not satisfactory to Mr. Hayes or Mr. Bebe, they can dismiss her. [10]

12. A monthly average of 53 employees eats one or more meals per day (including lunches prepared for the woods crew) at the defendant's cookhouse. The number of meals served transients is negligible. The cook is primarily dependent upon the meals

served to the employees for her ability to run the cookhouse, and, under the circumstances apparent from the record, she could not operate the cookhouse for the transient trade.

13. The cook is not subject to any actual loss in her operation of the cookhouse. The profit the cook makes depends upon her efficiency in operating the restaurant, plus the subsidy paid her by the defendant. During 1947, the subsidy accounted for 93.6 percent of the cook's net earnings.

14. The cook's duties require special aptitude and considerable managerial skill.

15. During the war, the company obtained supplemental food ration points and purchased food in Portland, Oregon, for the operation of the cookhouse. When a substitute cook took over during the regular cook's illness, the defendant hired and paid the kitchen helper and withheld income taxes from the wages it paid her. The company has authorized the cook to order cookhouse supplies and equipment and to bind the company for payment thereof or to make payment for which she is reimbursed by the company. The cook can get an advance from the defendant on draw day the same as defendant's mill and woods employees.

16. Other than the public eating places in Cottage Grove, Oregon, about 13 miles away, there is no other public eating place available to defendant's employees except the defendant's cookhouse. The employees who live in defendant's bunkhouses would

be unable to work for the company if they were not able to eat at the cookhouse or other place nearby. Employees who live at their own homes eat their lunch at the cookhouse, and from 3 to 18 lunches are prepared for the woods crew. [11]

17. The defendant's admitted purpose for this arrangement for operating its cookhouse is that there is a much greater chance of waste when the company operates it than when an individual operates it. More friction with the workmen.

18. The cook works about 73 hours per week and during 1947 earned an average of 89.7 cents per hour. No extra overtime was paid the cook by the defendant for work in excess of 40 hours per week, and the defendant has not kept any wage and hour records concerning the work of the cook and helper.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter of this action.

2. The cook is an employee of the defendant within the meaning of the Fair Labor Standards Act of 1938. The helper is not.

3. The said cook and kitchen helper are engaged in the production of goods for interstate commerce and in processes or occupations necessary thereto.

4. The defendant has not kept the records of the cook required by the act and regulations.

5. The cook is an executive and administrative employee as defined in the regulations. The pleadings and pre-trial order may be deemed amended accordingly.

6. By reason of the foregoing, the complaint herein should be dismissed.

Dated: Oct. 16th, 1948.

/s/ CLAUDE McCULLOCH,
District Judge.

[Endorsed]: Filed October 16, 1948. [12]

In the District Court of the United States
for the District of Oregon

Civil No. 3917

WILLIAM R. McCOMB, Administrator of the
Wage and Hour Division, United States De-
partment of Labor,

Plaintiff,

vs.

ROW RIVER LUMBER COMPANY, a corpo-
ration,

Defendant.

JUDGMENT

This cause having come on regularly for trial without a jury before the Honorable Claude McCulloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 4th and 5th day of March, 1948, plaintiff appearing by James F. Scott,

of the Office of the Solicitor, United States Department of Labor, defendant appearing by Carl E. Davidson and Charles P. Duffy, its attorneys; and

The parties having produced testimony and evidence in behalf of their respective contentions; and the court having considered fully all matters of fact and law presented by the parties, and findings of fact and conclusions of law having been submitted and findings of fact and conclusions of law having heretofore been signed by the court and entered of record on the 16th day of October, 1948;

Now, therefore, based upon the foregoing findings of fact and conclusions of law,

It is hereby considered, ordered and adjudged that the complaint herein be and the same hereby is dismissed.

Dated at Portland, Oregon, this 16th day of October, 1948.

CLAUDE McCOLLOCH,
District Judge.

Entered in docket October 16, 1948.

[Endorsed]: Filed October 16, 1948. [13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the whole of the final judgment entered in this action on October 16, 1948.

/s/ WILLIAM S. TYSON,
Solicitor.

/s/ JOHN J. BABE,
Assistant Solicitor.

/s/ GEORGE H. FOLEY,
Acting Regional Attorney.

/s/ JAMES F. SCOTT,
Senior Attorney.

United States Department of Labor, Attorneys for
Plaintiff.

[Endorsed]: Filed December 15, 1948. [14]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

To the Clerk of the above-named Court:

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the appellant designates the following portions of the record, proceedings, and evidence to be included in the record on appeal in this action:

1. Complaint.
2. Bill of Particulars.
3. Defendant's answer to complaint.
4. Reporter's transcript of the proceedings at the trial, a copy of which is filed herewith.
5. Plaintiff's Exhibit 1—Plaintiff's interrogatories.
6. Plaintiff's Exhibit 2—Defendant's Answers to Written Interrogatories.
7. Plaintiff's Exhibit 3—Group of statements, Row River Lumber Company, in re Mrs. Ida Garouette.
8. Plaintiff's Exhibit 4—Group of Statements, Row River Lumber Company, in re Mrs. Edith LeCompte. [15]
9. Plaintiff's Exhibit 6—Journal of Mrs. Edith LeCompte.

10. Plaintiff's Exhibit 7—Memorandum in re Cash received by Mrs. Edith LeCompte.
11. Memorandum Opinion dated June 15, 1948.
12. Findings of Fact and Conclusions of Law, filed October 16, 1948.
13. Judgment.
14. Notice of Appeal, filed December 15, 1948.
15. This Designation.
16. Appellant's Statement of Points on Which He Intends to Rely.
17. Stipulation as to Original Exhibits.
18. Order as to Original Exhibits.

/s/ WILLIAM S. TYSON,
Solicitor.

/s/ BESSIE MARGOLIN,
Assistant Solicitor.

/s/ KENNETH C. ROBERTSON,
Regional Attorney.

/s/ JAMES F. SCOTT,
Senior Attorney.

United States Department of Labor, Attorneys for Appellant.

Service of a copy hereof is hereby acknowledged this 23rd day of December, 1948.

/s/ CARL E. DAVIDSON,
/s/ CHARLES P. DUFFY,
Attorneys for Appellee.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS
ON WHICH HE INTENDS TO RELY

Pursuant to Rule 75 (d) of the Federal Rules of Civil Procedure, appellant states that the points on which he intends to rely on this appeal are as follows:

1. The Court erred in holding that the kitchen helper is not an employee of the defendant within the meaning of the Fair Labor Standards Act of 1938.

2. The Court erred in holding that the cook is an executive and administrative employee, as defined in the Regulations issued pursuant to Section 13 (a)(1) of the Fair Labor Standards Act.

3. The Court erred in failing to hold that the cook has been employed in violation of the overtime requirements of the Fair Labor Standards Act.

4. The Court erred in failing to hold that defendant has not kept the records of the kitchen helper, as required by the Fair Labor Standards Act and Regulations issued thereunder.

5. The Court erred in not holding that defendant has violated Section 15 (a)(1) of the Fair Labor Standards Act.

6. The Court erred in denying plaintiff-appel-

lant's prayer [17] for an injunction and in dismissing the action.

/s/ WILLIAM S. TYSON,
Solicitor

/s/ BESSIE MARGOLIN,
Assistant Solicitor

/s/ KENNETH C. ROBERTSON,
Regional Attorney

/s/ JAMES F. SCOTT,
Senior Attorney

United States Department of Labor,
Attorneys for Appellant.

Service of a copy hereof is hereby acknowledged
this 23 day of December, 1948.

/s/ CARL E. DAVIDSON
/s/ CHARLES P. DUFFY
Attorneys for Appellee.

[Endorsed] Filed January 7, 1949. [18]

[Title of District Court and Cause.]

STIPULATION AS TO ORIGINAL EXHIBITS

Pursuant to Rule 75 (i) of the Federal Rules
of Civil Procedure,

It Is Stipulated and Agreed by and between the
parties hereto, through their respective counsel, that,
subject to the approval of the Court, the originals
of plaintiff-appellant's Exhibits 3, 4 and 6 at the
trial of this action be sent to the United States Cir-

cuit Court of Appeals for the Ninth Circuit, in lieu of copies thereof, because of the expense involved in making said copies.

Dated: December 21, 1948.

/s/ WILLIAM S. TYSON,
Solicitor

/s/ BESSIE MARGOLIN,
Assistant Solicitor

/s/ KENNETH C. ROBERTSON,
Regional Attorney

/s/ JAMES F. SCOTT,
Senior Attorney
United States Department of Labor,
Attorneys for Appellant.

/s/ CARL E. DAVIDSON
/s/ CHARLES P. DUFFY
Attorneys for Appellee.

[Endorsed]: Filed January 7, 1949 [19]

[Title of District Court and Cause.]

ORDER AS TO ORIGINAL EXHIBITS

Upon consideration of the stipulation entered into by the parties hereto that the originals of plaintiff-appellant's Exhibits 3, 4 and 6 at the trial of this action be sent to the United States Circuit Court of Appeals for the Ninth Circuit in lieu of copies thereof, and it appearing to the Court that such originals should be so sent,

It Is Ordered that the originals of said exhibits be included by the Clerk of this Court in the record on appeal in this action, in lieu of copies thereof, subject to the further orders of the United States Circuit Court of Appeals for the Ninth Circuit in regard thereto.

Dated: Jan. 7, 1949.

/s/ CLAUDE McCOLLOCH,
United States District Judge. [20]

The undersigned hereby consent to the form and contents of the foregoing Order.

/s/ WILLIAM S. TYSON,
Solicitor

/s/ BESSIE MARGOLIN,
Assistant Solicitor

/s/ KENNETH C. ROBERTSON,
Regional Attorney

/s/ JAMES F. SCOTT,
Senior Attorney

United States Department of Labor,
Attorneys for Appellant.

/s/ CARL E. DAVIDSON
/s/ CHARLES P. DUFFY
Attorneys for Appellee.

[Endorsed]: Filed January 7, 1949. [21]

[Title of District Court and Cause.]

DOCKET ENTRIES

1947

Sept. 30—Filed complaint.

Sept. 30—Issued summons—to Marshal.

Oct. 2—Filed summons with return.

Oct. 9—Filed notice of motion and motion for bill of particulars.

Oct. 20—Filed stipulation to furnish bill of particulars and withdraw motion.

Oct. 20—Filed bill of particulars.

Oct. 20—Filed and entered order withdrawing motion for bill of particulars. Fee.

Oct. 20—Filed answer.

Oct. 20—Entered order setting for pre-trial conference Nov. 10, 1947. Fee.

Oct. 30—Entered order canceling pre-trial date of Nov. 10, 1947. McC.

Nov. 17—Entered order admitting Herman Marks and James Scott specially. Fee.

Nov. 17—Record of pre-trial conference and order setting for trial on January 20, 1948. McC.

1948

Jan. 2—Filed interrogatories of plaintiff.

Jan. 7—Entered order canceling trial date of Jan. 20 and resetting for trial on Feb. 10, 1948. McC.

Jan. 19—Filed answers to written interrogatories.

Jan. 28—Entered order setting for trial on Feb. 24, 1948. McC.

Feb. 25—Issued subpoena and 13 copies to attorney for plaintiff.

1948

- Feb. 26—Filed petition of plaintiff for subpoena duces tecum.
- Feb. 26—Filed and entered order for subpoena duces tecum. McC.
- Feb. 26—Issued two subpoenas duces tecum to Attorney Scott.
- Feb. 10—Entered order resetting to March 4, 1948, for trial. McC.
- Mar. 4—Record of trial. McC.
- Mar. 5—Record of trial and order taking under advisement. McC.
- Mar. 5—Filed subpoena.
- Mar. 5—Filed subpoena duces tecum.
- Mar. 8—Filed exhibits (on trial) 1 to 4, 6 and 7.
- Mar. 18—Entered order that plaintiff file brief 30 days after receipt of transcript; 30 days to answer; 15 days to reply. McC.
- Mar. 23—Filed transcript of proceedings March 4, 5, 1948.
- Apr. 22—Filed and entered order allowing plaintiff to May 8 to file brief with stipulation attached. McC.
- Apr. 26—Filed stipulation and filed and entered order for withdrawal of exhibits 4, 6 and 7. McC.
- May 10—Filed brief of plaintiff.
- June 4—Filed defendant's brief to Judge McColloch.
- June 15—Filed memorandum opinion. McC. [22]
- Aug. 2—Filed plaintiff's objections to defendant's proposed findings, etc.

1948

Aug. 2—Filed points and authorities supporting plaintiff's request.

Aug. 3—Entered order setting hearing on plaintiff's objections to defendant's proposed findings of fact and conclusions of law set for Sept. 13, 1948. McC.

Sept. 13—Record of hearing on plaintiff's objections to defendant's proposed findings and conclusions—argued and reserved. McC.

Sept. 23—Filed memorandum opinion. McC.

Oct. 16—Filed and entered findings of fact and conclusions of law. McC.

Oct. 16—Filed and entered judgment for defendant. (Case dismissed.) McC.

Dec. 15—Filed notice of appeal by U. S.

Dec. 15—Mailed notice of appeal to attorneys for defendant.

1949

Jan. 7—Filed appellant's designation of contents of record on appeal.

Jan. 7—Filed appellant's statement of points.

Jan. 7—Filed stipulation re order to send original exhibits to Court of Appeals.

Jan. 7—Filed and entered order to send original exhibits to Court of Appeals. McC. [23]

In the District Court of the United States
For the District of Oregon

United States of America,
District of Oregon—ss.

CLERK'S CERTIFICATE

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 24 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 3917, in which William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, is plaintiff and appellant, and Row River Lumber Company, a corporation, is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of court; that I have compared the foregoing transcript with the original thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony taken in this cause on March 4th and 5th, 1948; also original exhibits 3, 4 and 6, and copies of exhibits 1, 2 and 7.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 12th day of January, 1949.

(Seal) LOWELL MUNDORFF,
Clerk. [24]

In the District Court of the United States
For the District of Oregon

Civil No. 3917

WILLIAM R. McCOMB, Administrator of the
Wage and Hour Division, United States De-
partment of Labor, Plaintiff,

vs.

ROW RIVER LUMBER COMPANY, a corpora-
tion, Defendant.

Portland, Oregon,

Thursday, March 4, 1948

Before: Honorable Claude McColloch, Judge.

Appearances: Mr. James F. Scott, Attorney,
Wage and Hour Division, United States Depart-
ment of Labor, Attorney for Plaintiff. Mr. Carl
E. Davidson and Mr. Charles P. Duffy, Attorneys
for Defendant.

Court Reporter: Ira G. Holcomb.

PROCEEDINGS OF TRIAL:

Mr. Scott: Before we start this case, your Honor, there [1*] are two things I would like to ask you about. One is, I have a petition for a

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

subpoena duces tecum and an order here for a subpoena duces tecum addressed to the defendant and to Mr. Hayes, the president, which I would like to present to your Honor.

The Court: Can't you settle that between you? He wants some of your records. Do you have them here?

Mr. Davidson: I don't know. We have some of them. We have three of the items.

The Court: Have you seen this paper or these papers, rather, he is speaking about?

Mr. Davidson: I have not seen the papers, no.

The Court: Have you seen his copy?

Mr. Davidson: Yes. We haven't them with us this morning. We will try to get them this afternoon, to the extent that they are available, without the subpoena.

The Court: All right.

Mr. Duffy: I would like to state, your Honor, we have not agreed on a pre-trial order. Each side has prepared a proposed pre-trial order. At the time of the pre-trial conference, Mr. Marx, Chief Counsel for the Government, said he would prepare a draft of a proposed pre-trial order and several months went by with no action and finally, about a week ago, we were presented with a seventeen-page document to which we were asked to agree. We felt a good deal of the matter was irrelevant.

The Court: Proceed with the trial. Do you want to make [2] an opening statement?

Mr. Scott: Does your Honor want an opening statement first?

The Court: No. It is not necessary, as far as I am concerned, unless you wish to make one.

Mr. Scott: This is an action under the Fair Labor Standards Act, alleging a violation of overtime and other provisions of the Fair Labor Standards Act.

The defendant in this case operates a sawmill and planing mill about fifteen miles from Cottage Grove, Oregon. In connection with their mill the defendant has constructed a cookhouse. The issue in this case is whether the cook and kitchen help in the cookhouse are employees of the defendant within the meaning of the Fair Labor Standards Act of 1938.

I do not think there is any dispute over the fact that the cook and kitchen help have not been paid overtime compensation as required by the Fair Labor Standards Act and that they have worked in excess of forty hours per week without receiving such overtime compensation.

I have talked with Mr. Duffy, and the sole issue to be tried in the case is the employee and employer relationship. There is no dispute as to the application of the Act to the cook and kitchen help in the event they are determined to be employees.

Mr. Davidson: I think, your Honor, perhaps a brief statement of the facts might be helpful. The Row River Lumber Company [3] constructed a mill near Dorena in 1939. They do not have a company town and did not have a company town there at the time. They constructed a mill. One Mrs. Thomason, whose husband operated a local store, asked if

she could serve meals and if they would collect for them through the payroll from our employees, and we were glad to do that.

Then, later, Mrs. Thomason became ill and decided she did not want to do it any more and Mrs. Garoutte, her assistant, said she would like to start up herself. She had no equipment. We had an old building there which we completely remodeled and furnished the equipment to her, and she served meals to some of our employees. Some of them had their lunch at Cottage Grove. Very few of them lived there. She also fed some transients.

Mrs. Garoutte was succeeded by Mrs. LeCompte, the present cook, on the same basis. We pay subsidies at so much a meal on her statement that costs have gone up and, rather than have the prices for meals go up, because of the labor situation, we have paid those subsidies.

She buys her own groceries, decides what she shall serve, decides how much she has to have for meals.

Counsel says there is no dispute about overtime if the Act is applicable. We have no knowledge as to the profits made by the operator of this restaurant nor as to the hours that anyone works there. [4]

H. B. BEBE

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

(Testimony of H. B. Bebe.)

Direct Examination

By Mr. Scott:

Q. Your name is H. B. Bebe? A. Yes, sir.

Q. Where are you employed, Mr. Bebe?

A. By the Row River Lumber Company.

Q. In what capacity are you employed by the Row River Lumber Company?

A. Mill superintendent.

Q. The Row River Lumber Company is the defendant in this action? A. Sir?

Q. The Row River Lumber Company is the defendant in this action here?

The Court: Yes.

Q. (By Mr. Scott): How long have you been employed as manager of the Row River Lumber Company?

A. I didn't say manager. I said superintendent.

Q. As superintendent. I beg your pardon.

A. Since 1939.

Q. Since 1939? A. October, to be exact.

Q. Your capacity as superintendent of the Row River Lumber [5] Company, do you have general supervision, general over-all supervision of the operation of the sawmill and the planing mill?

A. Yes, sir.

Q. Where is the approximate location of the sawmill and the planing mill of the Row River Lumber Company in relation to Cottage Grove, Oregon?

A. You mean the distance?

Q. Yes.

A. It is about thirteen miles southeast of Cottage Grove.

(Testimony of H. B. Bebe.)

Q. Would you explain the physical setup of the planing mill and the sawmill of the Row River Lumber Company? Describe the buildings that are situated there.

A. I don't just exactly understand what you mean.

Q. There is a planing mill and a sawmill?

A. Yes, sir.

Q. And a log pond? A. Yes, sir.

Q. And an office? A. Yes.

Q. And a loading dock? A. Yes.

Q. There are some bunkhouses that are owned and operated by the Row River Lumber Company, is that right? A. Yes. [6]

Q. Also, there is a cookhouse that is owned by the Row River Lumber Company?

A. Yes, the building is.

Q. Did the Row River Lumber Company build the cookhouse building? A. Part of it.

Q. Will you explain what you mean by "part of it"? A. Sir?

Q. Will you explain what you mean by "part of it"?

A. Well, the original part was built by somebody that used it to bunk in for a while.

Q. Was that the Row River Lumber Company that used to bunk in for a while?

A. No; that was a private person that brought their own lumber and built it.

Q. Did the Row River Lumber Company buy this bunkhouse from this private person?

A. I couldn't say that.

(Testimony of H. B. Bebe.)

Q. Will you describe what manufacturing activities are performed by the Row River Lumber Company at the sawmill and the planing mill?

A. Well, sawing and planing and loading of lumber, if I understand your question right.

Q. Yes, sir. As I understand it, they are engaged in the production, sale and distribution of both rough green and planed [7] lumber?

A. That is right.

Q. Does the Row River Lumber Company secure its logs from its own stumpage?

A. Couldn't say to that.

Q. You don't know whether the Row River Lumber Company owns the timberlands from which the logs are cut?

A. I couldn't answer that.

Q. What is the location of the logging operations of the Row River Lumber Company from its mill?

A. Oh, it is about seven miles, a little northeast; that is, by road.

Q. Does the Row River Lumber Company use all the logs that it cuts for its own productive use, or does it sell some cedar logs to shingle manufacturers and some peelers to plywood mills?

A. We sell some, yes.

Q. You mean they sell some cedar logs to shingle companies?

A. Yes.

Q. And some peelers to plywood mills?

A. That is right.

Q. Approximately how many persons does the Row River Lumber Company have engaged as employees in its sawmill and its planing mill?

A. Well, it varies a little, but I would say between eighty and eighty-five at the planing mill and the sawmill. [8]

Q. And the sawmill?

A. That is right.

Q. Approximately how many employees does the Row River Lumber Company have at its timber-cutting site?

A. You mean just the cutting, or do you mean logging——

Q. All the woods employees.

A. Well, probably somewhere between fifty and fifty-five.

Q. Approximately how many board feet of lumber are sawed per day by the sawmill of the Row River Lumber Company?

A. Between one hundred and one hundred twenty.

Q. Between 100,000 and 120,000?

A. Yes, board feet.

Q. Does that include lumber that is processed at the planing mill, also, these figures that you just gave?

A. Yes, the lumber that we saw is processed in the planing mill.

Q. That figure you just gave, 100,000 to 120,000, does that include both lumber that is sawed and lumber that is planed?

A. No. That includes all of it. The 100,000 to 120,000 includes all of it.

Q. Includes the whole operation?

A. That includes the whole operation.

Q. At the present time the Row River Lumber

(Testimony of H. B. Bebe.)

Company, you say, owns this cookhouse that is located on property of the company at the mill?

A. Yes, sir.

Q. When did the Row River Lumber Company acquire that cookhouse?

A. Well, I think about 1942, as I remember it.

Q. Do you recall whether it was in October, 1942, when they began operating the cookhouse?

A. No, I couldn't tell you dates, no.

Q. You say that this cookhouse was previously a bunkhouse?

A. As I remember it, somebody built it there to bunk in, in—I don't know—1939 or 1940. I don't remember which it was now. It was before it was fixed over for a cookhouse.

Q. Do you know whether the Row River Lumber Company purchased the cookhouse?

A. Sir?

Q. Do you know whether the Row River Lumber Company purchased the cookhouse?

A. I don't know that. I don't know whether they purchased it or not.

Q. Did the Row River Lumber Company remodel that cookhouse, that bunkhouse, rather?

A. That is right.

Q. For use as a cookhouse? A. Yes, sir.

Q. Since the Row River Lumber Company remodeled the cookhouse in 1942, has the cookhouse been used to feed the employees of [10] the Row River Lumber Company? A. It has.

Q. Would you state what the cookhouse consists

(Testimony of H. B. Bebe.)

of? I mean, state the different rooms that are in the cookhouse.

A. Well, first, there is two bedrooms, a store-room, kitchen and dining room.

Q. The two bedrooms, as I understand, are used as living quarters for the cook, her family and kitchen help? A. That is right.

Q. Do you know whether or not the Row River Lumber Company paid the entire cost of the labor and materials used in the remodeling of the bunkhouse?

A. They did, as far as I know, yes.

Q. Do you know whether the Row River Lumber Company paid the entire cost of equipping the cookhouse? A. Yes, sir, they did.

Q. What did such equipment consist of?

A. Well, consisted of a stove and dishes, cooking utensils.

Q. And a refrigerator? A. Sir?

Q. Did it include a refrigerator?

A. Yes, sir.

Q. Forks, spoons, cups, saucers and dishes and all furniture necessary for use in the kitchen, dining room and living quarters? [11]

A. Yes, sir.

Q. You say you don't know whether the Row River Lumber Company owns this cookhouse?

A. Sir?

Q. You say you don't know whether the Row River Lumber Company owns this cookhouse?

A. I couldn't say to that.

(Testimony of H. B. Bebe.)

Q. Since 1942, when the Row River Lumber Company remodeled the bunkhouse into the cookhouse, how many cooks have served there?

A. Well, do you mean the ones that actually had the running of it or somebody that filled in?

Q. No, I mean permanent.

A. Well, two.

Q. Would you state the names of those two cooks?

A. Mrs. Ida Garoutte and Mrs. LeCompte.

Q. That is Mrs. Edith LeCompte?

A. Yes.

Q. Do you know what period of time Mrs. Garoutte served as cook?

A. As near as I remember, I think it was until about May, 1945.

Q. Since May, 1945, has Mrs. LeCompte been the cook? A. Yes.

Q. She is presently the cook? A. Yes.

Q. Do you know whether Mrs. Garoutte and Mrs. LeCompte had [12] any assistants to help them run the cookhouse?

A. They have always had waiters.

Q. How many waitresses did they have, do you know? A. One is all I have known.

Q. One at a time?

A. One at a time. That is right.

Q. Do you know what the work of a cook consisted of? What did it consist of? Preparation of the meals in the cookhouse? A. I don't know.

Q. You don't know what work was performed?

A. No.

(Testimony of H. B. Bebe.)

Q. Do you know what the activities of the kitchen help consisted of?

A. Well, I suppose they would help get the vegetables ready and set the tables and wait on the tables.

Q. Who selects the waitress or the helper in the kitchen? A. The cook.

Q. Who pays the waitress or the helper in the kitchen?

A. The lady that runs the cookhouse.

Q. Does the cook keep a record of the number of meals that she serves? A. Surely.

Q. Does she keep that on a monthly basis?

A. That I don't know, but I presume she would.

Q. At the end of each month the cook submits a list of the [13] meals eaten by company employees to the company mill office, is that right?

A. Yes, they come to the Portland office.

Q. Aren't they submitted first to the mill office?

A. That is right.

Q. Then the mill office sends them down to the Portland office? A. That is right, yes.

Q. Immediately? The mill office sends the list of the meals eaten down to the Portland office with the regular monthly payroll? A. Yes.

Q. What method is used by the Row River Lumber Company to pay the cook?

A. What do you mean, by check or cash?

Q. No. I mean, does the Row River Lumber Company pay the cook a salary or do they pay her on an hourly rate or how do they pay the cook?

(Testimony of H. B. Bebe.)

A. They pay her whatever the tickets call for. They get so much a meal and that is deducted from the men's wages.

Q. In other words, the cook is paid an agreed price per meal by the Row River Lumber Company? A. She is what?

Q. The cook is paid an agreed price per meal by the Row River Lumber Company?

A. Well, I don't know just exactly—I don't just exactly [14] understand that.

Q. There is a certain set price that the cook is paid for each meal that she serves?

A. That is right, yes.

Q. That price is a set price per meal?

A. Yes.

Q. Is the price per meal deducted from the employees' wages or does the Row River Lumber Company pay the full price of the meal?

A. It is deducted from the employee's wages.

Q. In addition to the amount that is deducted from the employee's wages, doesn't the Row River Lumber Company pay a subsidy to the cook?

A. Yes, sir.

Mr. Scott: At this time, your Honor, I would like to introduce into evidence plaintiff's interrogatories and defendant's answers to the interrogatories and have them marked Exhibits No. 1 and No. 2, please, sir. I offer those in evidence as Plaintiff's Exhibits No. 1 and No. 2.

The Court: They are admitted.

(Testimony of H. B. Bebe.)

(Plaintiff's Interrogatories and Defendant's Answers to Plaintiff's Interrogatories thereupon received in evidence and marked Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2, respectively.) [15]

PLAINTIFF'S EXHIBIT No. 1

In the District Court of the United States

For the District of Oregon

Civil Action File No. 3917

WILLIAM R. McCOMB, Administrator of the
Wage and Hour Division, United States Department of Labor,

Plaintiff,

vs.

ROW RIVER LUMBER COMPANY,
a corporation,

Defendant.

INTERROGATORIES

William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to Rule 33, Federal Rules of Civil Procedure, hereby serves upon Row River Lumber Company, defendant, the following interrogatories to be answered separately and fully in writing, under oath, by any officer or officers of defendant competent to testify in its behalf:

I.

What was the total dollar volume of sales by defendant for the period from January 1, 1947 to

(Testimony of H. B. Bebe.)

November 30, 1947 of lumber and other wood products by it at its sawmill and planing mill located near Dorena, Oregon?

II.

What was the total dollar volume of sales of such lumber and other wood products referred to above shipped by the defendant or on its behalf from points within the State of Oregon to points outside said State during the period from January 1, 1947 to November 30, 1947?

III.

Does the defendant own the land and building situated at or near the site of its said sawmill and planing mill, used as a cookhouse and place to feed persons employed by it in its said sawmill and planing mill?

IV.

If the defendant now owns, or formerly owned, the land and building mentioned in Paragraph III hereof, when did it purchase or otherwise acquire said land?

V.

Did the defendant purchase or otherwise acquire the land referred to in Paragraph III for the purpose of constructing the cookhouse or feeding place referred to in said paragraph?

VI.

Is the defendant now the owner of the land and cookhouse or feeding place referred to in Paragraph III? If it is not, when did it sell the land and buildings thereon and to whom and for what price?

(Testimony of H. B. Bebe.)

VII.

Did the defendant construct or cause to be constructed the cookhouse or feeding place referred to in Paragraph III, and, if so, when did such construction take place?

VIII.

What was the cost to the defendant of such construction referred to in Paragraph VII, hereof?

IX.

What were the total taxes on the land and cookhouse building or feeding place referred to in Paragraph III hereof during the year 1946, and has the defendant paid such taxes for said year?

X.

Did the defendant furnish and equip the cookhouse building or feeding place referred to in Paragraph III hereof, and, if so, what was the cost to the defendant of such furnishings and equipment, including but not limited to furnishings and equipment for the kitchen, dining room, and living quarters of the cook and kitchen help?

XI.

Did the furnishings and equipment mentioned in Paragraph X hereof include pots, pans, knives, forks, spoons, plates, cups, saucers, dishes or any other implements used for dining or feeding purposes, and, if so, which of such items were furnished?

XII.

Since the time when the defendant first supplied any of the furnishings and equipment set forth in

(Testimony of H. B. Bebe.)

Paragraph X hereof, has it furnished any replacements for any of the items so furnished?

XIII.

Has it been the practice of the defendant since it first supplied the furnishings and equipment referred to in Paragraph X hereof to replace or repair any of such furnishings or equipment when they become unsuitable for use, and, if so, what and when were the last replacements or repairs made?

XIV.

What was the total cost to the defendant for the years 1946 and 1947, respectively, of the replacements and repairs referred to in Paragraph XIII hereof?

XV.

Since the original construction of the cookhouse or feeding place referred to in Paragraph III hereof, has the defendant made, or caused to be made, any additions thereto or alterations or repairs therein, and, if so, when were such additions, alterations or repairs made, and what did they consist of?

XVI.

What was the total cost to the defendant for the years 1946 and 1947, respectively, of any additions, alterations or repairs referred to in Paragraph XV hereof, specifying the aggregate cost separately for additions, alterations or repairs?

XVII.

During the period since the construction of the cookhouse or feeding place referred to in Paragraph

(Testimony of H. B. Bebe.)

III hereof, has the defendant paid for or defrayed the cost of the water, gas, electricity and fuel used in the operation of the cookhouse or feeding place? If so, state the annual cost to the defendant for the years 1946 and 1947, respectively, of such water, gas, electricity and fuel, specifying the cost for each category separately.

XVIII.

Does the defendant furnish lodging to the cook or any other help employed in the cookhouse or feeding place referred to above, and, if so, does the defendant receive payment in money from persons to whom it furnishes such lodging?

XIX.

At what total sum does the defendant fix or estimate the value for 1947 of the lodging of each cook or helper referred to in Paragraph XVIII hereof?

XX.

For each month during the period from January 1, 1947 to November 30, 1947, what was the total number of meals (including lunches prepared for consumption off the premises) served at the cookhouse or feeding place referred to in Paragraph III to (a) defendant's employees employed in its said sawmill and planing mill and in its logging operation; (b) contractors with defendant and such contractors' employees; (c) transient persons; and (d) any other persons, specifying separately for each of the categories the number of meals so served.

XXI.

How much was charged per meal to the persons

(Testimony of H. B. Bebe.)

mentioned in each of the categories (a) through (d) set forth in Paragraph XX hereof?

XXII.

Aside from sums deducted for meals by defendant from wages paid its employees, did the defendant, during the period from the time the construction of the said cookhouse or feeding place was completed to the date hereof, pay to any persons any sums for or on account of any meals served to persons mentioned in categories (a) through (d) of Paragraph XX hereof, and, if so, how much per meal was paid and to whom was such payment made, specifying the amount separately for each of such categories. If the price per meal so paid by the defendant varied during such period, set forth each variation in the price and the period during which such price was in effect.

XXIII.

For each month in the years 1943, 1944, 1945, 1946 and 1947 what was the total amount paid by the defendant to the person or persons it claims to have operated the said cookhouse or feeding place for or on account of each of the following: (a) sums deducted by the defendant from the wages of its employees in payment of meals served to such employees during each such month; (b) in addition to sums so deducted, any other moneys for or on account of payment for meals served to such employees during each such month; and (c) any sums paid for or on account of meals served to persons who were not defendant's employees.

(Testimony of H. B. Bebe.)

XXIV.

For each month during the period from January 1, 1947 through November 30, 1947, how many persons were employed by the defendant in and about its said sawmill and planing mill and in its logging operations?

XXV.

For each month during the period from January 1, 1947 through November 30, 1947 what was the number of the defendant's employees referred to in Paragraph XXIV hereof who had one or more meals per day (including lunches prepared for consumption away from the premises) at the said cookhouse or feeding place?

Dated December 29, 1947.

/s/ WILLIAM S. TYSON,
Solicitor.

/s/ HERMAN MARX,
Regional Attorney.

/s/ JAMES F. SCOTT,
Attorney.

United States Department of Labor, Attorneys for
Plaintiff.

Service of a copy of the foregoing is acknowledged
this 2nd day of January, 1948.

/s/ CARL E. DAVIDSON,
Attorney for Defendant.

[Endorsed]: Filed January 2, 1948.

(Testimony of H. B. Bebe.)

PLAINTIFF'S EXHIBIT No. 2

In the District Court of the United States
for the District of Oregon

Civil No. 3917

[Title of Cause.]

ANSWERS TO WRITTEN
INTERROGATORIES

Comes now defendant and answers the written interrogatories submitted by plaintiff as follows:

1. \$1,421,199.89.
2. \$1,185,154.62.
3. Yes.
4. December 26, 1939.
5. No.
6. Yes.

7. Converted old bunkhouse to a cookhouse during the months of September, October, November and December, 1942.

8. \$1,923.88.

9. The tax assessment was made on the whole mill property with no segregation as to the land and cookhouse building.

10. (a) Yes. (b) \$72.93.

11. (a) Yes. (b) All items.

12. Yes.

13. (a) Yes. (b) Linoleum work on September 3, 1947.

14. (a) 1946—\$129.34. (b) 1947—\$887.87 (including refrigerator replaced at a cost of \$797.92).

(Testimony of H. B. Bebe.)

15. (a) Yes. (b) During August and September of 1946 the ventilation was improved and a wing was added for the cookhouse helper.

16. (a) 1946—Additions \$416.95; repairs \$312.33.

(b) 1947—None.

17. (a) Yes.

| (b) | 1946 | 1947 |
|-------------|----------|----------|
| Water | \$ 16.01 | \$ 83.19 |
| Electricity | 225.78 | 164.42 |
| Fuel | 137.50 | 100.50 |
| | <hr/> | <hr/> |
| | \$379.29 | \$348.11 |

18. (a) Yes. (b) No.

19. Cook \$360.00; helper \$120.00.

| 20. | Company Employees | Contractor's Employees | Total |
|-----------|----------------------|---------------------------|-------|
| 1947 | | | |
| January | 2204 | 17 | 2221 |
| February | 1912 | 34 | 1946 |
| March | 1880 | 120 | 2000 |
| April | 1964 | 32 | 1996 |
| May | 1891 | 156 | 2047 |
| June | 1581 | 95 | 1676 |
| July | 1429 | 17 | 1446 |
| August | 1267 | | 1267 |
| September | 1100 | | 1100 |
| October | 1162 | 27 | 1189 |
| November | 1066 | 10 | 1076 |
| | <hr/> | <hr/> | <hr/> |
| | 17456 | 508 | 17964 |

21. Fifty cents per meal to and including September 9, 1947; sixty cents per meal from September 10, 1947, to date.

(Testimony of H. B. Bebe.)

22.

| Mrs. Thomason | Employee Paid | Co. Subsidy | Net to Cook |
|------------------|---------------|-------------|-------------|
| August 1940 | .40 | .10 | .50 |
| Mrs. Gaurotte | | | |
| October 16, 1942 | .40 | .10 | .50 |
| Mrs. LeCompte | | | |
| May, 1945 | .40 | .15 | .55 |
| August, 1946 | .50 | .15 | .65 |
| September, 1947 | .60 | .15 | .75 |

Mrs. Thomason operated a General Store near the mill site and served meals in connection therewith. Her establishment was not large enough to accommodate the patrons so Row River Lbr. Co. remodelled a bunkhouse which they owned and was situated near her store. Mrs. Thomason continued as cook until October 16, 1942.

23.

| | 1943 | 1944 | 1945 | 1946 | 1947 |
|-----------|----------------|------------------|-------------------|-------------------|-------------------|
| January | \$ 422.58 | \$ 430.60 | \$ 873.00 | \$ 926.15 | \$1,443.65 |
| February | 337.50 | 520.00 | 857.30 | 829.05 | 1,264.90 |
| March | 339.50 | 625.70 | 1,056.00 | 1,027.55 | 1,300.00 |
| April | 344.50 | 494.50 | 975.00 | 705.80 | 1,297.40 |
| May | 349.50 | 867.50 | 916.82 | 1,139.00 | 1,330.55 |
| June | 357.50 | 823.50 | 1,132.68 | 1,232.35 | 1,089.40 |
| July | 281.50 | 541.50 | 956.50 | 1,019.10 | 939.90 |
| August | 333.50 | 904.50 | 970.20 | 1,334.95 | 823.55 |
| September | 449.00 | 807.50 | 959.94 | 1,210.30 | 792.50 |
| October | 358.00 | 968.00 | 598.95 | 1,242.80 | 891.75 |
| November | 284.00 | 957.50 | 974.27 | 1,158.30 | 807.00 |
| December | 436.50 | 676.00 | 609.00 | 1,065.35 | 927.75 |
| | <hr/> 4,293.58 | <hr/> \$8,616.80 | <hr/> \$10,879.66 | <hr/> \$12,890.70 | <hr/> \$12,908.35 |

(Testimony of H. B. Bebe.)

| | 24. | 25. |
|-----------------|------|------|
| January | 168 | 59 |
| February | 170 | 69 |
| March | 166 | 46 |
| April | 172 | 60 |
| May | 191 | 73 |
| June | 163 | 56 |
| July | 158 | 51 |
| August | 156 | 45 |
| September | 169 | 43 |
| October | 160 | 40 |
| November | 163 | 40 |
| December | | |

Dated this 17th day of January, 1948.

/s/ EDMUND HAYES,
President, Row River Lumber Company.

State of Oregon,
County of Multnomah—ss.

I, Edmund Hayes, being first duly sworn, depose and say:

That I am the president of Row River Lumber Company, the defendant within named; that I have read the foregoing answers to the written interrogatories submitted by plaintiff, know the facts stated therein, and that the same are true as I verily believe.

/s/ EDMUND HAYES.

Subscribed and sworn to before me this 16th day of January, 1948.

(Seal) /s/ M. C. JOHNSON,
Notary Public for Oregon.

My commission expires March 12, 1948.

(Testimony of H. B. Bebe.)

Service of the foregoing answers is hereby acknowledged this 19th day of January, 1948.

/s/ FLOYD D. HAMILTON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed January 19, 1948.

Q. (By Mr. Scott): I hand you Plaintiff's Exhibit No. 2, which is the defendant's answers to plaintiff's interrogatories, and ask you to look at Answer No. 12 on Page 3—Answer No. 22 on Page 3. I beg your pardon. A. 22, yes.

Q. You will note that the answer to Interrogatory No. 22 shows that from October 16, 1942, until May, 1945, when Mrs. Garoutte was the cook, that she was paid 50 cents per meal. Is that correct?

A. Until May, 1945?

Q. Yes, sir. A. Yes.

Q. Of that 50 cents it shows that 40 cents was deducted by the Row River Lumber Company from the wages due the employees of the company. Is that correct? A. Well, I would say yes.

Q. And it also shows during that period the company added a 10-cent subsidy per meal which was paid to the cook. Is that correct? A. Yes, sir.

Q. Also, it shows from May, 1945, to August, 1946, when Mrs. LeCompte was the cook, that a total of 55 cents per meal was paid to her?

A. Yes.

Q. Consisting of 40 cents deducted from the wages due the [16] employees of the Row River

(Testimony of H. B. Bebe.)

Lumber Company and a 15-cent subsidy paid to the cook by the Row River Lumber Company from funds of the Row River Lumber Company. Is that correct? A. Yes.

Q. And from August, 1946, to September, 1947, it shows that the cook was paid a total of 65 cents per meal consisting of 50 cents deducted by the Row River Lumber Company from the wages due its employees and 15 cents as a subsidy paid by the Row River Lumber Company to the cook from the company's funds. Is that correct?

A. Yes.

Mr. Davidson: I do not know how far this is going but, as I understand, the questions are put to the witness as to what certain documents show, not as to the witness' knowledge whether those are the facts or not. I think it is entirely irrelevant.

Mr. Scott: I am just asking him to explain.

The Court: Go ahead.

Mr. Scott: Beg your pardon?

The Court: Go ahead. Hurry it up.

Q. (By Mr. Scott): Since September, 1947, the cook has been paid 75 cents per meal, consisting of 60 cents deducted from the employees' wages and a 15-cent subsidy paid by the Row River Lumber Company from its own funds. Is that correct?

A. Yes, sir. [17]

Q. When an employee of the Row River Lumber Company eats at the cookhouse, the cook makes a record of that meal, is that correct?

A. Yes, sir.

(Testimony of H. B. Bebe.)

Q. If the employee so chooses, could he pay, directly to the cook in cash, the amount of money that would be deducted from his wages for that meal?

A. Well, it would be rather difficult to keep track of the subsidy that way.

Q. I just asked you: May an employee pay cash, proportionate cash for his meals that would be deducted?

A. That is something that has never come up, so I couldn't answer as to that.

Q. If the Row River Lumber Company were unable to make the proportionate deductions for the total amount of meals from employees' wages, nevertheless, would the Row River Lumber Company still pay the subsidy to the cook for the meals eaten by those employees?

A. I wish you would state that again, please.

Q. If the Row River Lumber Company is unable to make deduction from an employee's wages for meals eaten by the employee at the cookhouse, does the Row River Lumber Company, nevertheless, pay the cook a subsidy for those meals?

A. I would say no.

Q. I hand you a series of looseleaf pieces of paper entitled [18] "Statement—Row River Lumber Company, 823 Terminal Sales Building, Portland, Oregon," showing the name of Mrs. Ida Garoute, and her address, showing so many meals at a certain price and so many other meals at a certain

(Testimony of H. B. Bebe.)

price and so many other meals at a certain price. I will ask you to identify those pieces of paper.

The Court: Can't you stipulate on all of this?

Mr. Davidson: We could stipulate. I don't think Mr. Bebe could answer those questions.

The Court: Take them to Mr. Davidson, Mr. Bailiff. They are going to stipulate on these I think.

Mr. Davidson: We are willing to stipulate that plaintiff's Identification No. 3 consists of a group of statements, showing indebtedness of the Row River Lumber Company to Mrs. Garoutte for certain meals at a certain price or certain prices and certain amounts of so-called bonuses, and that Exhibit Identification No. 4 consists of similar statements entered by Mrs. Edith LeCompte. Does that cover it?

Mr. Scott: Yes. I would like to ask one thing, though.

Q. Were those prepared by Mrs. LeCompte and Mrs. Garrouette and given to the Row River Lumber Company, or were they prepared by the Row River Lumber Company and given back to the cook? It is my understanding that those were prepared by the Row River Lumber Company and sent back to the cook at the time that her check was sent to her.

Mr. Davidson: Maybe one of the bookkeepers will be able to tell.

Mr. Scott: We will ask Mrs. LeCompte.

Q. I hand you as part of Plaintiff's Identification No. 3 a slip of paper—two slips of paper, one with the number 4894, addressed to Mrs. Ida Gar-

(Testimony of H. B. Bebe.)

outte, dated March 13, 1945, and another with the number 4924, addressed to Mrs. Garoutte, dated April 12, 1945.

I call your attention to certain writings on the one dated March 13, 1945. I believe that is No. 4894. Do you find that number? A. Yes.

Q. It says: "Mrs. Garoutte: We could not collect from Douglas Burrell (\$10) and William Renninger (\$41.20). Will you please collect it from the men down there?"

However, the statement shows that Mrs. Garoutte was paid for 128 meals served to Burrell and Renninger at a bonus of 10 cents by the company. Is that correct?

A. I couldn't say. I don't know. I don't know whether that was the case or not. I don't just exactly understand what this is all about here. Were these people working for the company?

Q. Burrell and Renninger? A. Yes.

The Court: Talk up. [20]

The Clerk: Speak louder so the Reporter can hear you.

Q. (By Mr. Scott): I don't know whether they were working for the company or not. Apparently they were, yes.

A. Well, I don't know anything about those.

Q. On Statement No. 4924 it states "We were unable to collect 105 meals at 40 cents—\$42—from William Renninger. Will you please collect it from him down there?"

However, the statement also shows that Mrs. Garoutte was paid by the Row River Lumber Company a bonus of 10 cents per meal for 105 meals

(Testimony of H. B. Bebe.)

with the entry "Bonus on Renninger."

Do you still say if the Row River Lumber Company was unable to make a payroll deduction the company nevertheless did not pay the amount of the bonus to the cook?

A. If the man is not employed by the Row River Lumber Company, they don't pay any bonus.

Q. I don't mean that. If an employee is employed by the Row River Lumber Company, but the Row River Lumber Company for some season, such as shown on these two statements, is unable to make payroll deductions from the employee's wages, nevertheless does not the Row River Lumber Company still pay the amount of the bonus for those meals to the cook?

A. I wouldn't know that.

Q. Don't you have some idea or opinion on that question from reading these two statements?

A. I don't understand the circumstances of these two people. [21] I don't see why, if these are employees of the Row River Lumber Company, they could not deduct the full amount of the 60 cents or whatever it may be.

Q. Statement No. 4924 of this exhibit contains the note: "We were unable to collect 105 meals at 40 cents—\$42—from William Renninger" which would amount to \$22.20 due the cook from the company. It also shows that the cook was, nevertheless, paid for 105 meals at 10 cents a meal, amounting to \$10.50 by the company, as a company subsidy for those meals. Isn't that right?

A. Well, that is what the paper shows, but I don't understand—I don't know the circumstances of it.

(Testimony of H. B. Bebe.)

Q. But the paper does show that?

A. It probably does.

Q. Statement No. 4894 also shows 128 meals for which the company was not able to make a payroll deduction; nevertheless, a 10-cent subsidy was paid to the cook by the Row River Lumber Company?

A. I don't know the circumstances of this, either. I don't know what the circumstances were.

Q. I am just asking you if that is not what the statement shows?

A. That is what the statement shows, but there might be something else in between that and——

Q. Do you have any idea what the circumstances are? [22]

A. No. The man might have been sick or something that he didn't work, or something like that and didn't have anything coming for that month. I don't know.

Q. I ask you to look at Plaintiff's Identification No. 4, which is a group of statements, and particularly to No. 224 addressed to Mrs. Edith LeCompte, dated February 12, 1946, which shows that 1,584 meals were paid to her at a price of 40 cents while only 712—1,712, rather—were paid to her at a price of 15 cents as a bonus or subsidy. I will ask you why more meals were paid for at the subsidy than for which deduction was made?

Let me ask you this: Is not the explanation for that discrepancy the fact that an employee may, if he so chooses, pay the amount to the cook in cash, the amount of the deduction, but the company

(Testimony of H. B. Bebe.)

will nevertheless pay the subsidy to the cook for those meals?

A. I couldn't answer to that. I don't know how this came about at all.

Q. Since the Row River Lumber Company remodeled this bunkhouse into this cookhouse in 1942, and since the cook has been preparing the meals in the cookhouse, does the cook pay the Row River Lumber Company any rent for the cookhouse?

A. No, sir.

Q. In other words, the defendant furnishes to the cook, free of charge, the cookhouse, which consists of a kitchen, dining [23] room and living quarters for the cook, her family and the kitchen help. Is that correct? A. Yes.

Q. Does the Row River Lumber Company also furnish free of charge——

The Court: Don't cover things that are admitted in the interrogatories. There is no point to that. Those things are all admitted in the answers to the interrogatories, aren't they? Aren't they admitted?

Mr. Davidson: I think they are, yes.

Mr. Scott: I don't think so, your Honor. We had it in our pre-trial order, proposed pre-trial order.

Mr. Davidson: It is in our pre-trial order, too.

The Court: Look at the interrogatories and the answers. The pre-trial order has nothing to do with it.

Mr. Scott: I do not think it is stated in the interrogatories, your Honor.

(Testimony of H. B. Bebe.)

The Court: Let me have the interrogatories, Mr. Clerk. "Did the defendant furnish and equip the cookhouse building or feeding place referred to in Paragraph III hereof and, if so, what was the cost to the defendant of such furnishings and equipment . . . "

Mr. Scott: I wanted to ask the witness if the cooks themselves paid any expenses in the equipping of the cookhouse. I know the interrogatories or the answers to the interrogatories [24] state that the defendant paid something for the equipment of the cookhouse but I don't know whether the cooks themselves paid anything in addition.

The Court: All right.

Mr. Scott: I beg your pardon?

The Court: How about that, Mr. Witness? You know what he is asking about.

A. The cook pays nothing towards the maintenance or equipping of the cookhouse.

Q. (By Mr. Scott): The Row River Lumber Company furnishes all kitchen and dining room equipment? A. Correct.

Q. Does the Row River Lumber Company also furnish all equipment for living quarters of the cook and her family and the kitchen help?

A. No, not all of them.

Q. Does the Row River Lumber Company furnish a part of the furnishings and equipment for the living quarters used by the cook and her family and the kitchen help?

(Testimony of H. B. Bebe.)

A. No, I don't think so; only light and heating is all.

Q. Does the Row River Lumber Company furnish all of the light, water and fuel?

A. Yes, sir.

Q. Then, I was going to ask you: Do they furnish all the light, water and fuel necessary for the operation of the [25] cookhouse? A. Yes, sir.

Q. Does the Row River Lumber Company, at its own expense and without any charge to the cook, make all necessary repairs, alterations and additions to the cookhouse? A. Yes.

Q. Does the Row River Lumber Company, without any charge to the cook, make all necessary replacements or repairs of equipment in the cookhouse? A. Yes, sir.

Q. In other words, the cook is not charged anything whatsoever for the use, maintenance or operation of the cookhouse, nor does the cook pay any of her own money for use, maintenance and operation of the cookhouse? I am talking about the structure itself. Is that correct? A. That is right.

Q. Do you know the approximate size of the plot of ground on which the sawmill and planing mill and cookhouse of the Row River Lumber Company are located? A. About thirty-five acres.

Q. Does a hard-surface County highway run through the plot of land?

A. No, not through it; only just one little corner down where the Cookhouse is. That is part

(Testimony of H. B. Bebe.)

of it, the north and south end; the road goes through it, and the rest of it is [26] up to the river bank.

Q. On the east side of the highway that runs through the plot of land are located the sawmill, the planing mill, the office and the mill pond, as well as the loading dock and railroad tracks, is that right? A. That is right.

Q. On the west side of the highway is located the cookhouse? A. Yes, sir.

Q. Is the cookhouse located approximately directly across the highway from the sawmill building? A. No, it is not.

Q. How far from the office of the company is the cookhouse? A. Oh, about 300 feet.

Q. How far from the sawmill and planing mill is the cookhouse? A. Oh, probably 150 feet.

Q. Also, on the west side of the highway, does the Row River Lumber Company own bunkhouses?

A. Yes, sir.

Q. How many bunkhouses do they own at the present time? A. One.

Q. The structure of the bunkhouse and the land on which the bunkhouse is located are owned by the Row River Lumber Company? A. Yes, sir.

Q. Previously, did the Row River Lumber Company operate more than this one bunkhouse? [27]

A. Yes, sir.

Q. How many bunkhouses did the Row River Lumber Company operate? A. Two.

Q. What? A. Two.

(Testimony of H. B. Bebe.)

Q. Was that other bunkhouse located on land owned by the Row River Lumber Company?

A. No, sir.

Q. Is the land on which the cookhouse is located owned by the Row River Lumber Company?

A. Yes, sir.

Q. But you don't know whether the Row River Lumber Company owns the building?

A. No, I couldn't say. I don't know whether there is any compensation or any exchange to the person that built it, but the person that built it built it on company land to use for a short time.

Mr. Scott: Is the cookhouse owned, the building, by the Row River Lumber Company?

Mr. Davidson: Yes, that is right. It is on their land and they own it.

Mr. Scott: At the present time, and since 1942 when the bunkhouse was remodeled into the cookhouse, the Row River Lumber Company has owned the land and the building, is that [28] right?

Mr. Davidson: The cookhouse, yes.

Mr. Scott: The company owns both the land and the building?

Mr. Davidson: That is right.

Q. (By Mr. Scott): The present bunkhouse owned and operated by the Row River Lumber Company and the bunkhouse formerly operated by the Row River Lumber Company, were they maintained by the Row River Lumber Company to furnish lodging to its employees?

A. You mean at the present time?

(Testimony of H. B. Bebe.)

Q. Yes.

A. Yes. We are only operating one.

Q. Yes, I see. I will ask you this, then: At the present time you are operating the bunkhouse to furnish lodging to employees of the Row River Lumber Company? A. Yes, sir.

Q. The other bunkhouse that you previously operated, during the time that you operated it, was that for the purpose of furnishing lodging to employees of the Row River Lumber Company?

A. Yes, sir.

Q. As superintendent of the Row River Lumber Company, do your over-all supervisory duties include the sawmill, the planing mill, and the bunkhouse and cookhouse? A. Yes, sir.

Q. Do you know whether there is any segregation between the structure constituting the cookhouse, the land upon which the [29] cookhouse is located and the rest of the mill for taxation purposes? A. I don't know that, no.

Q. What is the nearest town to the sawmill and planing mill of the Row River Lumber Company?

A. Cottage Grove.

Q. And you said Cottage Grove is how far?

A. About thirteen miles, between thirteen and fourteen.

Q. Do you know the population or the approximate population of Cottage Grove?

A. I do not.

Q. Would you say it is approximately 2,000?

A. Yes. I think a little more.

(Testimony of H. B. Bebe.)

Q. 2,500?

A. Probably. I would have no way to guess at it.

Q. Between 2,000 and 2,500?

A. I would think something like that.

Q. What is the nearest public eating place to the mills of the Row River Lumber Company?

A. Well, I don't know what there is over where the Dorena Dam is being built. I don't know whether there is any public eating place there, but Cottage Grove would be the nearest that I would know of.

Q. Do you know anything about the "Y" cafe?

A. Not too much. The only thing I know is that I understand [30] it is only open from 2:00 in the afternoon until some time in the night.

Q. Do you know how far the "Y" cafe is from the mills of the Row River Lumber Company?

A. About eight miles.

Q. Do you know the approximate number of customers that the "Y" cafe can serve?

A. I do not.

Q. Is it your statement, then, that other than the public eating places in Cottage Grove there is no other public eating place available for the employees of the Row River Lumber Company?

A. Yes, sir, that is right.

Q. Since the cookhouse of the Row River Lumber Company was originally opened or started in 1942, have there been periods of repairs and alterations and additions to the cookhouse?

(Testimony of H. B. Bebe.)

A. Yes, there has been some, yes.

Q. Has the cookhouse remained open during all those periods of repairs, alterations or additions?

A. Yes, sir.

Q. Also, since the cookhouse was remodeled, have there been times when there have been replacements or repairs of equipment in the cookhouse?

A. No.

Q. There have never been any replacements or repairs of equipment [31] in the cookhouse?

A. There has been some in equipment such as dishes and some things like that, yes.

Q. But during those times that there were replacements or repairs of equipment, the cookhouse remained open? A. Yes, sir.

Q. Is it true the employees who live in the bunkhouse, or bunkhouses, in the past, of the Row River Lumber Company, eat all or practically all their meals at the cookhouse? A. Yes.

Q. The cookhouse of the Row River Lumber Company? A. Yes.

Q. In addition to those bunkhouse employees, don't other employees who eat their morning and evening meals in their homes, nevertheless, eat their noon meal at the cookhouse of the Row River Lumber Company? A. Yes, sir.

Q. Approximately how many employees at the present time live in the company's bunkhouse?

A. Six.

Q. When the company operated the other bunk-

(Testimony of H. B. Bebe.)

house, how many employees altogether lived in the two bunkhouses?

A. Oh, from ten to fifteen.

Q. Do you know what means of public transportation is available to employees between the mill and Cottage Grove? [32]

A. You say public transportation?

Q. Yes. A. None.

Q. Does the Row River Lumber Company operate a bus between the mill and Cottage Grove?

A. Yes, sir.

Q. Do some of the employees own automobiles so they can drive between the mill and Cottage Grove?

A. Most of them own them but they don't drive them.

Q. Then, would you say the employees are dependent upon the company bus or private automobiles to travel between the mills and Cottage Grove? A. Yes, sir.

Q. What is the capacity of the company bus?

A. Well, I couldn't say, but I imagine between fifteen and twenty men.

Q. It will carry that many? A. Yes, sir.

Q. What time does the bus leave Cottage Grove in the morning?

A. About 20 minutes to 7, as I remember it.

Q. What time does the bus arrive at the mill?

A. 15 after 7.

Q. What time does the bus leave at night to return to Cottage Grove?

(Testimony of H. B. Bebe.)

A. About 5:35 or 4:35. [33]

Q. About what time does it arrive at Cottage Grove?
A. Oh, a little after 5.

Q. How much after 5?

A. I wouldn't say that. It depends on the roads and your traffic and so on.

Q. Who drives that bus for the company?

A. Henry Arp.

Q. Isn't Mr. Arp an employee of the company who, during daytime, works in the mill?

A. Yes, sir.

Q. Don't several of the company employees who eat their lunch at the company cookhouse but who eat their breakfast and their evening meals in their own homes, don't several of them ride between Cottage Grove and the defendant's mill in the defendant's bus?
A. Repeat that.

Q. Don't they ride between Cottage Grove and the company's mill in the company's bus?

A. Yes, sir.

Q. Do you know when breakfast is served in the cookhouse?
A. 6:25.

Q. When is lunch served?

A. At 12:00 noon.

Q. And when is dinner served?

A. At 6:00 o'clock. [34]

Q. When do the sawmill and planing mill begin operations in the morning?
A. At 7:30.

Q. When is the lunch period for planing mill and sawmill employees?
A. Sir?

(Testimony of H. B. Bebe.)

Q. When is the lunch period for the sawmill and planing mill? A. 12:00 to 1:00.

Q. When does work cease at the end of the day in the planing mill and sawmill? A. At 4:30.

Q. When does work begin in the morning at the site of the logging operations? A. Sir?

Q. When does work begin in the morning at the logging operations?

A. I think 8:00 o'clock.

Q. Do you know the lunch period for the logging operations? A. 12:00.

Q. 12:00 to 1:00? A. 12:00 to 12:30.

Q. When does work cease in the woods?

A. 4:30.

Q. Also, does not the Row River Lumber Company operate a small bus between the mill and the logging operations? [35]

A. You say a small bus?

Q. Or a bus?

A. Well, I think they have a pickup that a few of the men can use if they want to go up a little earlier than the bus does. I don't know that. They only run one bus.

Q. The company does run one bus?

A. Yes, that is all.

Q. And that is the bus between the mill and Cottage Grove?

A. No, that is the bus between the mill and the woods, the logging operations.

Q. In order that we do not mix up the record.

(Testimony of H. B. Bebe.)

the company does operate this bus between Cottage Grove and the mill?

A. Not the one for the loggers.

Q. No. I am not talking about the one for the loggers.

A. I see. Excuse me.

Q. But the company does operate this bus between Cottage Grove and the mill that is driven by Mr. Arp?

A. Yes.

Q. In addition to that, they operate another bus or operate another run between the mill and the logging operations in the woods?

A. Yes.

Q. How long does it take to go one way between the mill and the logging operations?

The Court: What does that have to do with this cookhouse? [36]

Mr. Scottt: I am going to show, your Honor, that this is an integrated operation that the Row River Lumber Company operates up there. Every activity that they perform is interdependent; that the operation of this cookhouse is essential to the operation of the mill and the operation of the logging activity.

The Court: Go ahead. You can carry along indefinitely. It depends on how much detail you think would be needed to show what you describe as an integrated operation.

Mr. Scott: I will say most of this is in the proposed pre-trial order.

The Court: I don't care whether it is there or not. It does not bind me. Read the question.

(Question read.)

(Testimony of H. B. Bebe.)

A. I would say it takes about 40 minutes to go up and about 30 or 35 to come down. That is just a guess.

Q. (By Mr. Scott): I will ask you this now: In addition to the operation of the sawmill and planing mill, the Row River Lumber Company does perform its own logging operations?

A. Yes, sir.

Q. What means does the Row River Lumber Company use to pay the cook and kitchen help?

A. Did you say "assistant help?"

Q. I say: What means does the Row River Lumber Company use to pay the cook and kitchen help? Are they on a salary, an [37] hourly wage or what?

A. The cook pays the kitchen help.

Q. The cook pays the kitchen help?

A. Yes, sir.

Q. And the company pays the cook a certain amount per meal? A. Yes, sir.

Q. Does the company buy the food for the cook?

A. No, sir.

Q. Does the cook receive any cash compensation from the Row River Lumber Company other than the difference between the price per meal paid by the company to the cook and the money the company is required to pay—the money the cook, rather, is required to pay for the food and the kitchen help?

A. No, she does not; not to my knowledge.

Q. So far as you know, does the kitchen help receive any money other than as paid by the cook to the kitchen help? A. Not that I know of, no.

(Testimony of H. B. Bebe.)

Q. Do you know how many hours per week the cook works? A. No, sir.

Q. Do you know how many hours per week the kitchen help works? A. I don't know that, no.

Q. Do you know whether the cook and kitchen help are working over 40 hours a week?

A. Well, I wouldn't know that, either, but I would presume the cook would, but I don't know.

Q. You presume the cook works over 40 hours. Do you know whether the cook has been paid overtime compensation for work in excess of 40 hours by the company?

A. That is included in the price she is paid per meal.

Q. She is paid nothing extra as overtime compensation? A. No.

Q. Has the Row River Lumber Company maintained a record of the hours worked per day and per week of the cook and the kitchen help?

A. Not to my knowledge, no.

Q. If the Row River Lumber Company had kept a record of the daily and weekly hours, would you have knowledge of it? A. Possibly not.

Q. Who selected Mr. Garoutte to operate the cookhouse?

A. If my memory is right, I think it was solicited.

Q. I beg your pardon?

A. If my memory is right, I think it was solicited.

(Testimony of H. B. Bebe.)

Q. Mrs. Garoutte solicited it?

A. Yes, if I remember right.

Q. Whom did she talk to?

A. I think she talked to Mr. Hayes.

Q. He told her she could operate the cookhouse?

A. I expect Mr. Hayes did, yes.

Q. Do you know whom Mrs. Le Compte talked to? A. Yes, sir. [39]

Q. Did she talk to you? A. Yes, sir.

Q. Did you ask Mr. LeCompte to serve as cook, or did she solicit the position?

A. No, I asked her.

Q. How did you happen to select Mrs. LeCompte as a person to ask?

A. Because I knew that she had cooked before and I thought she was possibly available.

Q. You made the agreement on behalf of the Row River Lumber Company? A. Yes.

Q. Between the Row River Lumber Company and Mrs. LeCompte? A. Yes.

Q. Was the agreement written?

A. Was there one made?

Q. I say, was the agreement written?

A. No, sir.

Q. Entirely oral? A. Verbal.

Q. Does the verbal agreement have any definite term which it is to run? A. No, sir.

Q. Could the Row River Lumber Company terminate the agreement at any time? [40]

A. They could, but they would be reasonable about it.

(Testimony of H. B. Bebe.)

Q. What do you mean, that they would be reasonable?

A. Well, if a person was not satisfactory, they would give them a reasonable length of time to get out.

Q. Yes. But if the Row River Lumber Company wanted to, it could terminate the agreement without any notice, isn't that correct? I say, if they wanted to?

A. If they wanted to, but then the Row River Lumber Company isn't made up of that kind of citizens.

Q. Yes, sir. Can the cook terminate the agreement at any time she wants to? A. Yes, sir.

Q. When the agreement was originally made, was there anything said about the manner in which it would be terminated? A. No, sir.

Q. Was anything said about giving any notice about termination of the agreement?

A. No, sir.

Q. Was anything said about being reasonable at the time? A. No, sir.

Q. Have any complaints ever been made to you by the employees concerning the quantity or quality of the meals served at the cookhouse by either Mrs. LeCompte or Mrs. Garoutte?

A. Not to my knowledge, no.

Q. If the cook at the cookhouse were to terminate the agreement, [41] would you want her to give you notice of her intention?

A. I would sure appreciate it, if one would.

(Testimony of H. B. Bebe.)

Q. Would you expect it, under the terms of the agreement? A. Sir?

Q. Would you expect her to give you notice?

A. Well, yes. I would expect her to be fair.

Q. And, similarly, would you expect to be fair to the cook? A. Yes, sir.

Q. Do you recall that any complaint was ever made to you about some lunchboxes?

A. Yes, sir, I do.

Q. Who made those complaints?

A. Some of the boys that carry lunches.

Q. As I understand the situation, Mr. Bebe, employees who work in the woods have lunches prepared for them by the cook to take in the woods, to eat at noon? A. Yes.

Q. About how many lunches are prepared to be taken in the woods?

A. Oh, they vary anywheres from four to sixteen.

Q. What was the nature of these complaints you mentioned a moment ago about lunchboxes?

A. Well, the complaints were that the pails had not been properly washed, as I remember it.

Q. Whose duty was it to wash the pails properly? [42]

A. That I don't know. I don't know whether it would be the cook or the lady that helps.

Q. But it would be either the cook or the kitchen help? A. It would be one or the other.

Q. To wash the pails properly? A. Yes.

Q. What did you do?

(Testimony of H. B. Bebe.)

A. I just went and talked to Mrs. LeCompte about it.

Q. What did you say to Mrs. LeCompte?

A. I just asked her about the lunch pails, that I had a complaint they were not properly washed.

Q. Did you tell her they would have to be washed properly in the future? A. No, sir.

Q. Did you tell her to check up on that matter?

A. Yes, sir.

Q. Did you know that she would check up on the matter and that no further instructions were necessary? A. Yes, sir.

Q. If instructions had been necessary, do you feel you had the authority to give them to her?

A. For what?

Q. If further instructions had been necessary to the cook concerning the lunch pails, would you have felt you had the authority to give her any necessary instructions? [43] A. Yes, sir.

Q. Do you recall any other time when complaints have been made by employees about the quantity or quality of meals?

A. No, I don't. I don't recall any time that there were any other complaints on either one of the cooks.

Q. When were those complaints made about the lunch pails, do you recall?

A. I don't remember. I presume it is somewhere close to a year ago.

Q. If additional complaints are made by employees as to the quantity or quality of the meals,

(Testimony of H. B. Bebe.)

and you thought the complaint was justified, would you go to Mrs. LeCompte and talk to her about the complaint? A. Yes, sir.

Q. Would you give her any instructions you thought necessary to correct the complaint?

A. No. I would tell her what the complaint was and let her use her own judgment.

Q. By that you mean Mrs. LeCompte would know what to do and, therefore, further instructions would not be necessary? A. Yes, sir.

Q. But you do not mean to say, if you thought instructions were necessary, that you would not feel you had the right to give them?

A. Let's have that question again. [44]

Q. If you thought that instructions to Mrs. LeCompte were necessary or appropriate, would you feel you would have the right to give them?

A. Sure.

Q. You say "Sure"? A. Yes.

Q. Would you say Mrs. LeCompte and Mrs. Garoutte are excellent cooks?

A. Well, they are good cooks, yes.

Q. Would you say you feel the Row River Lumber Company has been fortunate in obtaining a cook who does not require instructions and supervision by you as to the operation of the cookhouse?

A. Yes, I think so.

Q. If you had a cook at the cookhouse who did require instructions and supervision by you, would you exercise that supervision and give her the instructions you thought necessary?

(Testimony of H. B. Bebe.)

A. Yes, sir.

Q. Does the cook buy all of her own food?

A. Yes.

Q. Does she pay for it herself?

A. As far as I know, she does.

Q. Does the Row River Lumber Company advance the cook money for the operation of the cookhouse or give her a loan?

A. If they do, I don't know anything about it.

Q. Does the Row River Lumber Company ever buy any groceries for the cook?

A. Not that I know of.

Q. I hand you Plaintiff's Indentification No. 4 and show you the statement dated July 12, 1945, on No. 5016, with that number printed on it, and ask you what the language "Less two sacks potatoes, \$8.02" stands for?

A. Well, that is something I didn't know was on there until you came out to the mill last week. I didn't know anything about this at all until—That is something between the office force and Mrs. LeCompte.

Q. I hand you statement No. 4986, dated June 13, 1945, with the entry "Less two sacks potatoes, \$8.68" and "Draw 6/5/45, \$200," and ask you what those entries mean?

A. Well, I don't know anything about that. I had nothing to do with them.

Q. Does the Row River Lumber Company have what they call a "Draw Day" and "Pay Day"?

A. Yes, sir.

(Testimony of H. B. Bebe.)

Q. When is "Draw Day" and when is "Pay Day"?

A. The 15th is pay day and the 30th is draw day.

Q. Pay day is when they make——

A. That is when you get your statement.

Q. That is when you are regularly paid your wages? A. Sure. [46]

Q. That is when you regularly receive your wages? A. Yes.

Q. What is "Draw Day"?

A. "Draw Day" is the 15th—I mean the 30th. Some may want to draw and some may not.

Q. What?

A. Some might want to draw and some do not. They are solicited. We go around to see them to see what they want to draw.

Q. What do they draw? Do they draw money?

A. Draw checks, yes.

Q. Do they draw on wages that they have earned? A. Yes.

Q. For the past fifteen days? A. Yes, sir.

Q. Could Mrs. LeCompte draw on "Draw Day"?

A. I don't see any reason why she couldn't.

Q. She could draw just the same as any other employee could?

A. She could ask for a draw, I think. It would not have to be "Draw Day" if it was necessary.

Q. What do you mean, it would not have to be "Draw Day"?

A. I—A lot of them draw between times.

(Testimony of H. B. Bebe.)

Q. Could Mrs. LeCompte draw between times if she asked the company? A. I think so.

Q. I hand you a statement, No. 29, dated August 13, 1945, [47] with the entry "Less: R. E. Lafferty & Sons, \$8.20," and ask you to explain that entry.

A. Where is that?

Q. August 13, 1945.

A. Wasn't that the contractor?

Q. I don't know.

A. I don't know either because Lafferty, he didn't do any business with me, but I think the company had land there that he did some work on for them.

Q. I show you Statement No. 96, dated 10/12/45 with the entry "12- 3-lb. jars Spry, \$8.16," and ask you to explain what that entry means?

A. I don't know.

Q. You don't know what any of these entries mean?

A. No, sir, I don't. I had nothing to do with them.

Q. Do you recall the circumstances under which the meals were increased to 75 cents September 9, 1947? A. You say, do I recall it?

Q. Do you recall the circumstances of the meals—Do you recall the reasons why the meals were increased, or the conversation between you and Mrs. LeCompte as to the increase of the price of meals to 75 cents on September 10, 1947?

A. On account of advances in grocery prices.

(Testimony of H. B. Bebe.)

Q. Did Mrs. LeCompte come and ask you to increase the prices?

A. She came and asked me if there could be something done [48] about it, yes.

Q. Do you recall exactly what she said?

A. No, I don't.

Q. Do you recall what you told her?

A. I just told her we would see.

Q. What did you mean when you said, "We will see"? A. What do you mean?

Q. I mean this: You would have to check with somebody else, is that what you mean?

A. Sometimes we have got to have time to think things over. You have got a lot of things to consider in that case. You have got your men and everything. You can't just decide that off the bat.

Q. Mrs. LeCompte could not have increased the price to 75 cents without asking you, is that right?

A. Well, she should not at least.

Q. I wish you would answer me Yes or No.

A. No.

Q. Did you talk to Mr. Hayes then about whether or not meals should be increased to 75 cents? A. I don't remember that.

Q. Did you subsequently tell Mrs.—

A. Sir?

Q. Did you subsequently tell Mrs. LeCompte she could get 75 cents for the meals? [49]

A. That is right.

Q. Do you recall the circumstances or the con-

(Testimony of H. B. Bebe.)

versation when the meals were increased to 65 cents in August, 1945?

A. No, I don't. I don't recall that at all.

Q. That would be August, 1946.

A. No, I don't recall that.

Q. Or when the meals were increased to 65 cents on May 1, 1945, do you recall the circumstances under which the increase was made or any conversation pertaining to the increase?

A. No, I don't remember.

Q. However, every time that these increases were made the company gave its permission to the cook? A. Yes.

Q. Has the cook always asked the company for an increase in price when prices have been increased, or has the company ever increased the price on its own initiative?

A. I don't remember that. I don't know whether they gave a voluntary advance or not. I couldn't say.

Q. Is it not true that the company voluntarily made an increase itself, without any request of the cook? A. I wouldn't know.

Q. I think you testified that the cook turns in a list of the meals she serves to the individual employees and that list is sent to the Portland office?

A. Yes, sir. [50]

Q. I think you said, didn't you, at the same time that the list of meals is sent in the monthly payroll also is sent in to the Portland office?

A. Yes, sir.

(Testimony of H. B. Bebe.)

Q. I think you said, didn't you, at the same time that the list of meals is sent in the monthly payroll also is sent in to the Portland office?

A. Yes, sir.

Q. During months that the cook would not make a very great profit or could hardly make any profit at all, does the company guarantee the cook a certain amount of money, or does the company make up any loss that the cook would incur?

A. That is something we would take up when that thing occurred.

Q. But the company would not let the cook take a loss herself, would it?

A. Well, that is something that would have to be done into when the time ever comes, if something like that would happen.

Q. If it turned out the cook was making hardly anything or the cook was losing money, the company would take means to correct the matter, is that right?

A. That is why those raises came about in those different years, to overcome such a possibility as the cook losing money.

Q. Who selects the kitchen help, do you know?

A. The cook. [51]

Q. Do you have anything at all to do with selecting the kitchen help?

A. No, sir.

Q. Do you have anything at all to do about paying the kitchen help?

A. No, sir.

Q. Do you have anything at all to do about the

(Testimony of H. B. Bebe.)

amount of money the cook will pay the kitchen help? A. No.

Q. Do you have anything to do about the hours that the cook and kitchen help will work?

A. No, sir.

Q. You said at the present time, with the one bunkhouse, there are six employees living in the bunkhouse? A. Yes.

Q. And that when you had two bunkhouses, how many employees did you say would live in both?

A. Somewhere between — anywheres between about ten and sixteen.

Q. Yes, sir. Does the Row River Lumber Company maintain the cookhouse and operate the cookhouse with its own employees?

A. How broad do you mean that?

Q. I mean the bunkhouse?

A. The maintenance or what?

Q. I am talking about the person that makes the beds and [52] cleans up the bunkhouse. Is that an employee of the Row River Lumber Company?

A. Yes, it is.

Q. Who hired that employee to take care of the bunkhouse? A. I think Carl Shoberg.

Q. That person is an employee of the Row River Lumber Company that maintains the bunkhouse?

A. Yes.

Q. The person that maintains the bunkhouse is an employee of the Row River Lumber Company?

A. Yes, when she is taking care of the beds, she is.

(Testimony of H. B. Bebe.)

Q. How much are employees charged for use of the bunkhouse? A. \$2.00 a week.

Q. Are those charges paid by the employees through payroll deductions? A. Yes, sir.

Q. The same as the charges for food they eat in the cookhouse is paid through regular payroll deductions? A. Yes, sir.

Q. What is the reason why it is necessary or it was necessary that the Row River Lumber Company construct and equip this cookhouse?

A. Well, for convenience.

Q. Where would the employees be able to eat, if you did not have this cookhouse? [53]

A. Sir?

Q. Where would the employees be able to eat?

A. They would have to eat at home.

Q. What about the employees who live in the bunkhouse? A. They would not have any.

Q. Would not have any?

A. They would not have none, no.

Q. You would have—You would not have a bunkhouse unless you had a cookhouse?

A. We have no cookhouse, either.

Q. However, under the situation as it does exist the employees who do live at the bunkhouse would have no other place to eat except the cookhouse, is that right? A. That is right.

Q. What is the purpose of the Row River Lumber Company constructing and maintaining a bunkhouse?

A. Well, so the men would have a place to sleep.

(Testimony of H. B. Bebe.)

Q. I presume you mean single men, men who do not live with their families, would not have any place to live if it were not for the bunkhouse furnished by the company? A. That is right.

Q. Possibly not so at the present time, but during the last three or four years was it not very vital to the operation of the company that this cookhouse and bunkhouse facility be available for employees? [54]

A. Not any more than it was for the United States Government.

Q. Yes. I realize that. A. All right.

Q. A lot of the production was for war purposes, but I mean this: During the war would the company have been able to operate if it had not been able to furnish employees with bunkhouse and cookhouse facilities?

A. Oh, you can do almost anything when you have to.

Q. What do you mean by that, that during the war you were making a greater effort than you would at other times? A. Yes, sir.

Q. The operation of the bunkhouse is a convenience and an inducement for employees who would have no other place to live to work at the Row River Lumber Company? A. Yes.

Q. And these employees who live at the bunkhouse are dependent upon the company—are dependent upon the cookhouse, I should say, for meals? A. That is right.

(Testimony of H. B. Bebe.)

Q. What is the purpose of the company paying this subsidy on meals?

A. Well, I presume it was to—we are at a little disadvantage in being out where we are, and it was to make it a little more attractive for the employees out there.

Q. By that you mean that the mill is located in a rather [55] isolated place? You mean that the mill is located in a rather isolated place and it is an inducement to the employees who work there to make cheap meals available?

A. I presume that is the idea.

Q. Would you say whether it is or not rather than——

A. I presume so.

Q. Would you say Yes or No whether you presume that to be the reason?

A. Well, I would say Yes.

Q. Also, does not the subsidy act as a certain minimum guarantee to the cook for each meal that she serves?

A. Well, it would not be any different whether the employee paid the 75 cents or the company—whether the employee paid the 60 and the company the 15-cent subsidy.

Q. At the present time the cook is guaranteed 15 cents of the 75 cents by the company, isn't that true?

A. Yes.

Q. So, in effect, the company is guaranteeing her 20 per cent of the cost of the meal; she can rely on that and be sure that she will get it?

(Testimony of H. B. Bebe.)

A. She is getting 100 per cent. When the employee eats there, the cook gets that.

Q. You said you had the over-all supervisory responsibility of the mill and cookhouse. Are you Mrs. LeCompte's supervisor, too? [56]

A. No, sir.

Q. Do you visit the cookhouse regularly?

A. No, sir.

Q. Do you eat meals in the cookhouse?

A. Sometimes.

Q. Do you eat at least one meal a week in the cookhouse?

A. Yes, it will probably average that.

Q. Do you visit the cookhouse on other occasions, other than when you go there to eat a meal?

A. Sometimes, yes.

Q. What are the other occasions when you visit the cookhouse?

A. Well, sometimes when her icebox or something goes wrong with it or some other things that need looking after, some leaks in the water system and so on.

Q. You would go over there and see what is to be done? A. Yes.

Q. To put it in proper working order?

A. Yes.

Q. Do you ever go over to the cookhouse for the purpose of inspecting the cookhouse to see if it is being maintained properly? A. No, sir.

Q. When you go over there to eat meals, do you make it a point to observe the condition of the cook-

(Testimony of H. B. Bebe.)

house and to see how things are being operated there? [57] A. Yes, sir.

Q. When an increase has been given in the price per meal, what were the considerations, or what was the basis on which the new price was fixed?

A. I don't understand that.

Q. When prices of meals are set, are they set in an amount which the company figures will enable to cook to pay for the food and for the help and make something of a profit for herself? Is that the basis on which the meals are set, the prices of the meals? A. I presume it was.

Q. With the company setting the amount the cook can charge for a meal, that restricts the amount that the cook can make out of the operation of the cookhouse, doesn't it?

A. The company has nothing to do with transient prices at all. The cook sets her prices on transients.

Q. How much transient trade is there at the cookhouse, if any? A. Sir?

Q. How much transient trade is there at the cookhouse? Isn't that negligible?

A. Is that what?

Q. I said, there is very little transient trade at the cookhouse?

A. Sometimes there is quite a little bit.

Q. The cook certainly could not operate the cookhouse for the transient trade, could she? [58]

A. No, not—You could not.

(Testimony of H. B. Bebe.)

Q. Would the transient trade amount to more than \$10 a month?

A. Well, I couldn't say to that. Sometimes it is likely to; sometimes the company boarders——

Q. The cook is primarily or practically totally dependent upon the meals served to the employees for her ability to run the cookhouse, isn't that true?

A. Yes.

Q. I will ask you this question again: By setting the maximum amount that the cook may charge a company employee for eating at the cookhouse, doesn't the company limit the amount of profit the cook is going to be able to make?

A. That is why these meals have been raised from time to time.

Q. Yes, I realize it has been necessary to raise the price of meals. A. Realize what?

Q. I realize it has been necessary to raise the prices of meals. A. Yes.

Q. In order to enable the cook to make a profit?

A. Yes.

Q. But I am not saying that. What I am saying is this: The amount of profit at the present time that the cook can make is limited by the fact that she cannot charge more than 75 cents a meal to the company employees, isn't that true? [59]

A. Well, I presume it is.

Q. Are there any particular types of meals served at the cookhouse? A. No.

Q. Is there any particular menu that the company asks the cook to serve at the cookhouse?

A. No, she is free to——

(Testimony of H. B. Bebe.)

Q. Are the meals just ordinary plain meals that are sufficient for people doing this type of work?

A. Yes, sir, they are.

Q. Then, in the operation of the cookhouse, in which the cook is merely, you say, serving ordinary plain meals, her expenses will be more or less fixed as to the amount she is to be paid for it, won't they?

A. Well, not necessarily.

Q. Of course, I realize that the expense that she has to undergo for the amount of food that she serves will depend on the number of employees who eat there, but I am asking you this: Since it is merely an ordinary meal that she is serving, the amount that each meal will cost here is pretty well standardized?

A. Well, it is a little different in the way you buy. If you buy in quantity, why, it is not fixed what her profit will be.

Q. Didn't you say a while ago that the amount of profit that she can make is limited by the fact that she can charge just 75 cents per meal at the present time? [60]

The Court: That is argumentative. That is not a proper question.

Q. (By Mr. Scott): Do you know whether the employees who live in the company bunkhouse and eat at the company cookhouse have deductions made for meals that they do not eat at the cookhouse?

A. I don't know that.

Q. When you originally talked to Mrs. LeCompte about becoming the cook, was it specifically said one way or the other about the kitchen help as

(Testimony of H. B. Bebe.)

to whether or not the company would furnish the kitchen help or whether she would furnish the kitchen help?

A. It was understood that she was to furnish the kitchen help.

Q. How many days does the mill operate per week? A. No?

Q. Yes. A. Five days, 40 hours.

Q. How many days per week does the cookhouse and bunkhouse—How many days per week are they available to the employees?

A. Well, the bunkhouse is available seven days and the cookhouse—I don't know—Sometimes the boys check out and are all gone, so that leaves the cook free. I don't know how many days or how often that happens, but it happens quite often, when they all check out on Friday night or Saturday morning.

Q. If all the employees do not check out on a week end, would it be necessary for the cookhouse to be open on Saturday and Sunday? [61]

A. Not always, no. It is not compulsory. It is not compulsory.

Q. In the operation of the planing mill and the sawmill of the Row River Lumber Company, you said the company had its own logging operation, is that correct? A. Yes, sir.

Q. Do they furnish their own steam in the operation of the mill? A. Yes, sir.

Q. Do they furnish their own water?

A. No, sir.

(Testimony of H. B. Bebe.)

Q. Where do they get their water?

A. The drinking water comes from Cottage Grove, the Cottage Grove water line.

Q. But they do furnish a bunkhouse for their employees, you said? A. Yes, sir.

Q. Does the company perform its own hauling of logs from the woods to the mill?

A. Partially.

Q. What do you mean, partially?

A. Well, part of it is contracted at so much a thousand.

Q. And part of it is performed by the company, too? A. We have our own trucks, yes.

Q. When the cook goes on vacation—Let me ask you this [62] question: Do you know whether the cook does take a vacation? A. Sir?

Q. Do you know whether the cook does take a vacation?

A. Whether she gets any vacation?

Q. Yes. A. I think she does, yes.

Q. During the time that she takes her vacations does she arrange for a substitute cook?

A. I think so, yes.

Q. Does the company approve the substitute that the cook selects any time she goes on her vacation?

A. I didn't get that.

Q. Does the company select or approve the substitute that the cook chooses when she goes on vacation? A. The cook makes her own choice.

Q. Then the responsibility under this agreement for the operation of the cookhouse is passed from

(Testimony of H. B. Bebe.)

the cook to her substitute without the necessity of company intervention or the company taking any action whatsoever?

A. I don't just follow that, Mr. Scott.

Q. Let me state it this way, then: The responsibility and the duty and obligation under this agreement that the cook is to operate the cookhouse, I say, pass from her to her substitute when she goes on vacation without any action necessary by the Row River Lumber Company? [63]

A. Yes, sir, that is right.

Q. When a cook is taken sick, does she arrange for a substitute during those periods?

A. I don't know that it has been done. I think the cook, the one that runs the cookhouse—I think Mrs. Garoutte was sick a little while and I think, if I remember right, she selected the substitute, I am not sure. I know I didn't.

Q. Do you know the reason that the Row River Lumber Company had for setting up the operation of the cookhouse on this basis rather than operating the cookhouse itself? What was the reason why they set it up on this basis?

A. On the way we are running it now?

Q. Yes, rather than the company operating the cookhouse?

A. Well, there is a much greater chance of waste when the company operates it than when an individual operates it.

Q. Also, does it relieve the company of the re-

(Testimony of H. B. Bebe.)

sponsibility of having to purchase food and seeing that the meals are prepared?

A. Well, I suppose it would, yes.

Q. Also, does it enable the company to have a cook who will work fairly long hours and receive only the difference between the amount she pays for her expenses and the amount she receives for meals? In other words, isn't it a means of getting rather cheap labor to operate this cookhouse?

A. You seem to know quite a little bit about it. You ought to know the difference between the cost and what she gets out [64] of it. You seem to have gone into it pretty thoroughly. You should know what her wages are better than I do.

Q. Perhaps I do know what the wages are. Under the agreement that you had with Mr. LeCompte for the operation of the cookhouse, is she expected to take precautions against accident and damage to the cookhouse and other property there in the cookhouse? A. Does she expect what?

Q. Is she expected to take precautions against accident or damage to the cookhouse or property of the company?

A. She is not held responsible for any.

Q. She is not held responsible for any damage?

A. She is not held responsible for any damage.

Q. You say under the agreement you had with Mrs. LeCompte, as long as the work is done properly, the company will have no complaint and will not try to supervise her?

A. How is that again?

(Testimony of H. B. Bebe.)

Q. I say, under the agreement with Mrs. LeCompte and the agreement with Mrs. Garoutte, so long as the work that the cooks perform is done properly, the company will have no complaint or will make no attempt to supervise the operation of the cookhouse, is that right?

A. That is right.

The Court: We will recess until 2:00 o'clock.

(Thereupon, at 12:55 p. m., a recess was taken until 2:00 p. m.) [65]

Court reconvened at 2:00 o'clock p. m. Thursday, March 4, 1948.

H. B. BEBE

thereupon resumed the stand and was further examined and testified as follows:

Direct Examination—(Continued)

By Mr. Scott:

Mr. Scott: At this time I wish to offer in evidence Plaintiff's Identifications No. 3 and 4.

Mr. Davidson: No objection.

The Court: Admitted.

(Group of statements, Row River Lumber Company, in re Mrs. Ida Gourette, thereupon received in evidence and marked Plaintiff's Exhibit No. 3.)

(Group of statements, Row River Lumber Company, in re Mrs. Edith LeCompte, thereupon received in evidence and marked Plaintiff's Exhibit No. 4.)

(Testimony of H. B. Bebe.)

Q. (By Mr. Scott): Mr. Bebe, you said previously the Row River Lumber Company had operated two cookhouses. Would you state at approximately what time they ceased operating the second cookhouse?

A. They operated two, you say?

Q. You said previously that the Row River Lumber Company [66] operated two bunkhouses, I mean.

A. Yes, sir.

Q. Will you state at about what time the company ceased operating the other bunkhouse?

A. Well, it must have been some time about November, or something like that.

Q. For how long did the company operate two bunkhouses?

A. Somewhere in the neighborhood of two years.

Q. What was the reason the company ceased operating the one bunkhouse?

A. Well, we did not have enough men to fill the two of them and we needed the other house for a person to live in.

Q. Does the Row River Lumber Company employ contractors to perform road work and things like that for the company?

A. That I don't know.

Q. At the present time does the Row River Lumber Company contract with or have a contract with Youngblood & Martin for certain purposes?

A. No, not now.

Q. Untily recently did they have a contact with those people?

(Testimony of H. B. Bebe.)

A. Well, I couldn't say to that. I don't know.

Q. When you made the arrangement or agreement with Mrs. LeCompte to act as cook at the cookhouse, did you tell her what her employment relationship with the Row River Lumber Company would be? [67]

A. No, I didn't.

Q. Was anything said at all about what her employment relationship would be with the company?

A. No, there wasn't. She was on her own.

Q. I beg your pardon?

A. She was on her own.

Mr. Scott: I ask that the last answer be stricken as not responsive to the question.

The Court: It may stand.

Q. (By Mr. Scott): The fuel that is used in the operation of the cookhouse is furnished the cook by the company, is that right?

A. Just how is that again?

Q. I say, the fuel that is used in the operation of the cookhouse is furnished by the company?

A. Yes, sir.

Q. Would you describe the procedure that the cook uses to get a load of wood delivered to her at the cookhouse?

A. She usually orders it from the wood man.

Q. Who is the wood man that you say she orders the wood from?

A. The man there that takes the wood from the sawmill and planing mill.

Q. Does the Row River Lumber Company sell this scrap wood to this wood man? A. Yes.

(Testimony of H. B. Bebe.)

Q. Then does this wood man sell this wood around the area to different purchasers?

A. Yes, sir.

Q. And among the purchasers to whom he sells wood is the cookhouse of the Row River Lumber Company?

A. Yes, sir.

Q. Does the cook pay for the wood or does the Row River Lumber Company?

A. The Row River Lumber Company pays for the wood.

Q. Yes, sir; but the cook orders the wood from the wood man?

A. Yes.

Q. Then the wood man bills the Row River Lumber Company for the amount of the wood?

A. That is right.

Q. How long have you been connected with the lumbering business, Mr. Bebe?

A. About forty years.

Q. Do you know whether most sawmills and planing mills have a cookhouse operated in conjunction with the mill?

A. It depends on the place of operation.

Q. During the war, when rationing was in effect, do you know whether the Row River Lumber Company made application to the rationing board for supplemental rations for use in the cookhouse of the Row River Lumber Company?

A. Well, I couldn't answer that. [69]

Q. Did Mr. Hayes ever speak to you about seeing if extra rations would be needed at the cookhouse?

A. No, he didn't.

(Testimony of H. B. Bebe.)

Q. In case it is necessary to repair the cook-house, is there any special procedure that Mrs. LeCompte has to follow to request repairs to be made?

A. No, there is no procedure. All she has to do is to make it known that she would like to have it done, what she would like to have done, and it is looked into and it is usually complied with.

Q. Is the same thing true as to replacement or repair of equipment in the cookhouse?

A. What?

Q. The repair and replacement of equipment in the cookhouse, what procedure does Mrs. LeCompte have to follow to request repairs or replacement of equipment in the cookhouse?

A. Sometimes she will voluntarily go and buy them and turn the bill over to the company, at the office.

Q. You say sometimes she does it and turns the bill over to the office?

A. Sometimes, if it is a small amount, dishes or something like that, she—dishes or something like that that she needs, she would probably buy a few and the bill is presented to the company.

Q. Then the company repays Mrs. LeCompte, is that right? [70]

A. Well, if she pays for it, they do.

Q. If she does not pay for it, the company will pay the seller for the product?

A. That is right.

Q. At other times the company itself will do the ordering of the equipment?

A. Yes, sir.

(Testimony of H. B. Bebe.)

Q. In selecting a person to operate the cookhouse of the Row River Lumber Company, do you consider that any special skill is required of a person to fulfill such a capacity, or would you say that anybody who is a good cook is able to serve as cook? A. Yes, a good manager.

Q. Anybody that is a fairly good cook and a fairly good manager is able to serve as cook at the cookhouse? A. I would think so.

Q. You do not have to be an expert chef or have any specialized training in purchasing to operate the cookhouse? A. No.

Q. Does the cook have any other responsibility that you know of other than the purchasing of food and the preparing of the food?

A. No, I wouldn't think so.

Q. Would you say that there are any other responsibilities of management in the operation of the cookhouse other than merely [71] purchasing the food and cooking the food?

A. No, I wouldn't think there was.

Q. Under this arrangement you have with Mrs. LeCompte, if the amount of money she receives per meal would not be sufficient to cover the cost of the food she buys and the help she retains, and to give her some compensation and if she brought the matter to the attention of the company that she was not receiving enough money for those purposes, would the company undertake to remedy the matter? A. Could not.

Q. I beg your pardon?

(Testimony of H. B. Bebe.)

A. Just state that question again.

Mr. Scott: Maybe you have answered it before. I will withdraw the question. You have answered it before. That is all.

Cross-Examination

By Mr. Davidson:

Q. I want to ask you a few questions now. Your position is that of mill superintendent?

A. Yes.

Q. In your position of mill superintendent, you have authority over the sawmill and planing mill, the manufacturing plant? A. Yes.

Q. Do you have any authority over the logging?

A. I have not. [72]

Q. Any over the timber cutting? A. No.

Q. That is an entirely different department from the mill? A. That is a different department.

Q. Were you there when the original arrangement was made with Mrs. Thomason?

A. I was working there, yes.

Q. Were you mill superintendent then?

A. Yes.

Q. Will you tell the Court what that arrangement was?

Mr. Scott: I beg your pardon, your Honor. I would like to object to this testimony as to Mrs. Thomason, because the conditions under which Mrs. Thomason served as cook were completely different from the conditions under which Mrs. LeCompte and Mrs. Garoutte served as cook, and the Govern-

(Testimony of H. B. Bebe.)

ment is making no contention at the time Mrs. Thomason was serving as cook that she was an employee of the company or that there was any violation of the Act during that time. The Government is limiting its case to the time subsequent when the Row River Lumber Company constructed its own cookhouse.

Mr. Davidson: Your Honor, the Government is contending this is an integrated operation. I think the history of this operation should show in the record.

The Court: Proceed.

Q. (By Mr. Davidson): Will you state what the arrangement [73] was that Mrs. Thomason worked under?

A. I don't know just what the arrangements were.

Q. Did she operate a restaurant or a cookhouse?

A. No. Mrs. Thomason operated—I didn't make the arrangement with Mrs. Thomason.

Q. Was that on company property?

A. No, sir.

Q. Did the company own the building in which it was operated? A. No.

Q. Was Mrs. Thomason married? A. Yes.

Q. What did her husband do?

A. They had a little store in conjunction with the place where they ate, I think.

Q. A store in conjunction with the cookhouse?

A. Yes.

Q. When Mrs. Thomason gave this up and Mrs.

(Testimony of H. B. Bebe.)

Garoutte came in, did you have anything to do with making the arrangement or agreement with Mrs. Garoutte? A. I didn't, no.

Q. You did have with Mrs. LeCompte?

A. I did, yes.

Q. Had you known Mrs. LeCompte before?

A. I had.

Q. I believe you testified you saw her and told her what the [74] arrangement was?

A. Yes.

Q. What did you tell her the arrangement was?

A. Well, I told her—I don't remember what the meals were at that time, but we told her the price, what they had been charging and what the subsidy was and what the company agreed to furnish.

Q. What did the company agree to furnish?

A. They agreed to furnish the light, water and fuel and a place where they dwell.

Q. You said you contracted this fuel with a fuel man? A. Yes.

Q. Did you have any fuel delivery equipment you could use for delivering the fuel?

A. No, we haven't any.

Q. You do not deliver any fuel at all?

A. No.

Q. It is all handled through the wood man?

A. Yes.

Q. As I understand you, Mrs. LeCompte and Mrs. Garoutte bought their own groceries?

A. Yes, sir.

(Testimony of H. B. Bebe.)

Q. Their profit, then, is the difference between the amount they receive for meals and the subsidy on the one hand and, on the other hand, the cost of their food and help, is that right? [75]

A. Yes.

Q. Do you consider that it takes any special skill to make a profit out of that situation?

A. Well, it would take some careful managing.

Q. Have you ever operated a restaurant?

A. No, sir.

Q. Do you know anything about it?

A. No, not about a restaurant.

Q. You have been asked to identify certain items here set forth in these statements. Did you have anything to do with the preparation of these statements that Mrs. LeCompte submitted to the company?

A. Let's see. I don't just——

Q. There are some statements in evidence here as Plaintiff's Exhibits No. 3 and No. 4, monthly statements.

A. Yes.

Q. Did you have anything to do with the preparation of those statements?

A. No, sir.

Q. You did not direct their preparation?

A. No, sir. I had nothing to do with it.

Q. Did you have anything to do with the financial transactions between Mrs. LeCompte and the company?

A. No, sir.

Q. You stated that you had supervision over the planing mill [76] and the sawmill properties and the cookhouse?

A. Yes, sir.

(Testimony of H. B. Bebe.)

Q. Did you agree with Mrs. LeCompte, when you made your arrangement, your original arrangement, that you should have supervision over the cookhouse? A. I did not.

Q. You do have supervision over the cookhouse on the property? A. Well, yes, I do.

Q. It is your responsibility to see that it is repaired when it needs it?

A. That is right.

Q. Did you ever tell Mrs. LeCompte what she shall have on the menu? A. No, sir.

Q. Or where she shall buy? A. No.

Q. Or whom she shall employ for helpers?

A. No, sir.

Q. What did you mean when you said you had supervision over the cookhouse?

A. I didn't say that.

Q. I believe you did say it. A. Did I?

Q. Yes. A. Well, maybe. [77]

Q. Do you have any authority to direct her in how she shall do her work, in how Mrs. LeCompte shall do her work?

A. No, I never have, no.

Mr. Scott: Your Honor, he is asking him directly if he had any authority to direct her in how she does her work. That is an opinion. I object to it.

The Court: You asked about it.

Mr. Davidson: He certainly did.

The Court: Go ahead.

Q. (By Mr. Davidson): Now, you also testified

(Testimony of H. B. Bebe.)

that you had a complaint that lunchboxes were not clean? A. Yes.

Q. You took this up with her, did you?

A. Sir?

Q. You took that up with Mrs. LeCompte?

A. Yes, sir, I did.

Q. Did you consider that you had authority to supervise her methods of cleanliness in the cook-house?

A. No. I don't know as I—It had to be taken to somebody, if there was a complaint about anything like that, for it to be looked into.

Q. If her services were such that you felt they were going to cause any unrest in the crew, you would have to terminate the arrangement?

A. That is right. [78]

Q. Do you know what profit Mrs. LeCompte makes from her operations?

A. I do not.

Q. Do you know what Mrs. Garoutte made?

A. No, I don't.

The Court: Maybe they didn't make any profit.

Mr. Davidson: Maybe not, your Honor. I asked if he knew what they made.

Q. Do you consider that the continued operation of the cookhouse is essential in the Row River Lumber Company operation?

A. Well, it is rather convenient.

Q. You testified there were six men in the bunk-house now? A. Yes.

Q. That is out of a crew of about 150?

(Testimony of H. B. Bebe.)

A. Yes.

Q. That is one bunkhouse you own. Are there other bunkhouses? A. Yes.

Q. Who owns them?

A. Humphrey, the store man.

Q. Has the company anything to do with that store? A. No, sir.

Q. Do you know if the company deducts store bills from wages? A. I don't know.

Q. You don't know? A. No. [79]

Q. Do you know if the company deducts charges for the bunkhouse, these other bunkhouse charges from wages?

A. I am not sure, but I rather think they do.

Q. Do you know if Mrs. Garoutte worked for Mrs. Thomason before she started herself?

A. I think she did.

Q. Do you eat your meals at the cookhouse?

A. I will average about a meal a week. I would say that would be a fair average.

Q. Do you know who made the arrangement with Mrs. Thomason?

A. Well, I didn't. I think probably Mr. Hayes did.

Q. Do you know who made the arrangement with Mrs. Garoutte?

A. I do not. I did not make it.

Q. Were you specifically authorized to make the arrangement with Mrs. LeCompte?

A. Yes. I was asked to.

Q. By whom? A. By Mr. Hayes.

(Testimony of H. B. Bebe.)

Mr. Davidson: That is all.

Redirect Examination

By Mr. Scott:

Q. You say you do not have supervision over the logging and timber operations of the Row River Lumber Company

A. No, sir, I don't.

Q. Who does have supervision over the lumbering and timber [80] operations?

A. You mean the logging?

Q. Yes.

A. Mr. Bloomer.

Q. Mr. Bloomer is employed by the Row River Lumber Company?

A. Yes, sir.

Q. And the employees working under Mr. Bloomer in the woods are employed by the Row River Lumber Company?

A. Yes, sir.

Q. When you said the company has no equipment for delivering the fuel——

A. They have not.

Q. I beg your pardon?

A. They have no equipment for delivering the fuel.

Q. They might not have special equipment, but they do have trucks, don't they?

A. Yes, but they are always busy somewhere else.

Q. When you said the company has no equipment for delivering fuel, you meant——

A. They have none engaged in that business of delivering fuel.

Q. The company has no equipment that is engaged in delivering fuel?

A. That is right.

(Testimony of H. B. Bebe.)

Q. But the company does own trucks that could be used to deliver fuel, if they so choose? [81]

A. Well, they could, if you wanted to take them off the job they are doing.

Q. Mr. Davidson asked you about your opinion of the skill required to operate the cookhouse. On your direct examination didn't you state anybody that was a fairly good cook and a fairly good manager could operate a cookhouse?

A. Well, they should be. I would think they would be capable.

Q. In your experience in the logging industry and in the operation of the mill, which you stated is quite a considerable time, so far as you know, specialized skill and training is not necessary to operate a cookhouse at a lumber camp?

A. Well, that might cover quite a bit. I don't know.

Q. We will put it this way, then: You do not have to take a special course in purchasing to be able to operate a cookhouse, do you?

A. No. I have never known of any.

Q. You do not have to go to a special school for cooks to be a cook at a cookhouse in a lumber camp, do you? A. No.

Q. So far as you know, the cooks that have been at the cookhouse of the Row River Lumber Company, that is, Mrs. Garoutte and Mrs. LeCompte, have acquired their skill in cooking in the kitchens of their homes, the same as any other housewife, is that true? A. Yes. sir. [82]

(Testimony of H. B. Bebe.)

The Court: The greatest school there is, the school of experience.

Mr. Scott: Yes, sir.

Q. You stated that you have supervision over the planing mill and sawmill and cookhouse, is that right?

A. It seems to me we have come back to that many times. I think I answered it four or five or six or seven or eight times now.

Q. Mr. Davidson, on cross examination, asked you about it, and I think you gave an answer in which you said you supervised the cookhouse to the extent of seeing that it is properly repaired and has the proper equipment in it and things of that nature.

A. I did, yes.

Q. Yes, sir. You also said that you eat on an average of one meal a week in the cookhouse?

A. I think that is about right, yes, sir.

Q. On your direct examination you stated that when you visit the cookhouse to eat your meals, you look around to see how the cookhouse is being operated and how conditions look, how it is?

A. Well, yes.

Q. Didn't you also say on your direct examination that if a complaint was made to you as to the operation of the cookhouse that you thought was justifiable you would feel you [83] should go to Mrs. LeCompte and that you would have authority under this arrangement to go to Mrs. LeCompte and speak to her about the complaint.

A. Well, I would go over and talk it over and

(Testimony of H. B. Bebe.)

see if it could be corrected, not that it would be because I had authority.

Q. Why would you go to her if you did not have authority? A. What?

Q. You would feel, would you not, that under that arrangement it was part of your duty, as superintendent of the mill, to see that the cookhouse was run properly, wouldn't you?

A. Yes, but anybody could do that. It would not necessarily have to be me.

Q. Will you explain that last statement of yours?

A. If somebody made a complaint, the one that made the complaint could go and talk about it and ask for something to be corrected, or something special.

Q. If an ordinary employee went to Mrs. LeCompte and made a complaint, there would be no reason why Mrs. LeCompte should feel she should do anything about it, if she did not want to, would there?

A. Well, anybody that is interested in their meals would be.

Q. If a complaint were made to you as to the operation of the cookhouse, and you went to Mrs. LeCompte and told her that a complaint had been made, and you had certain thoughts as to [84] certain changes to be made, would you expect Mrs. LeCompte to carry out your suggestions as to the correcting of the changes?

A. Well, I think I would, if such a complaint

(Testimony of H. B. Bebe.)

came that was justifiable, and I think Mrs. LeCompte would be glad to cooperate with me in my wishes.

Q. Would you expect her to comply with your wishes, even though she might not want to, if you thought your wishes should be complied with in the proper operation of the cookhouse?

A. I don't know—I don't want to answer that.

Q. I beg your pardon?

A. I don't want to answer that.

(Question and answer read.)

Q. Would you answer that question, please?

A. Well, I think, as much as I know of Mrs. LeCompte, she would grant immediately whatever complaint was made.

Q. Yes, I realize that, but if she felt in a particular case she did not want to comply with your wishes, but you thought that the cookhouse could not be properly operated unless your wishes were complied with, would you expect her to comply with what you asked her to do?

A. I think I would.

Q. You say you think you would?

A. Yes, sir. [85]

Q. Mr. Davidson asked you whether or not you considered the operation of the cookhouse as essential to the operation of the mill, and you said you thought it would be convenient?

A. Yes, sir.

Q. If the employees who eat at the cookhouse, at the mill, were not able to avail themselves of the

(Testimony of H. B. Bebe.)

convenience of eating at the cookhouse, would it seriously interfere with the operation of the mill if they quit?

A. If the ones that eat there—the ones that stay in the bunkhouse?

Q. No. I say, if the people who eat at the cookhouse—— A. Yes.

Q. ——were not able to get their meals there and quit the company because they were not getting their meals, would that seriously interfere with the operation of the mill?

A. It might make it a little difficult for a little while, but we would overcome it in some way.

Q. As to the employees who live in the bunkhouse, Mr. Bebe, I believe you stated they would be unable to work at the mill if they were not able to get their meals at the cookhouse?

A. That is right.

Q. During the last few years, especially during the war, was not the operation of the cookhouse essential to the continued operation of the mill?

A. Not much more so than now. [86]

Q. If the operation of the cookhouse is merely a convenience rather than a necessity to the operation of the mill, would you explain to me why the company invested all this money in the construction of the cookhouse, in the equipping of the cookhouse, and why they pay this subsidy to the cook per meal?

A. Were you ever around a cookhouse that made any money? Any operation of that kind? I have

(Testimony of H. B. Bebe.)

got forty years and I have got my first one to find yet. Every one of them is run at a loss to the company.

Q. If the cookhouse is run at a loss, and they are always run at a loss, is it not essential to the continued operation of the mill that they do have this cookhouse? The company is not undergoing this economic loss just for convenience, are they?

Mr. Davidson: That is argumentative.

The Court: That is argumentative, yes. Ask another question.

Mr. Scott: That is all, your Honor.

Recross Examination

By Mr. Davidson:

Q. If, of course, the employees quit in a large body for any cause, it would be an inconvenience, wouldn't it? A. Yes, sir.

Q. Does the agreement give you power to supervise the details of operation of the cookhouse? [87]

A. No, sir.

Q. If a complaint were made and you gave it to Mrs. LeCompte, would you expect to advise her in detail as to how that should be corrected?

A. No, I would not, not in detail, because I think she is capable—If I told her of the complaint, she would be capable of correcting whatever the complaint was.

Q. Suppose there was a complaint that there was not enough variety of food at breakfast,—

A. Yes.

(Testimony of H. B. Bebe.)

Q. Would you order Mrs. LeCompte as to any change she should make?

A. I would tell her what the complaint was.

Q. Would you tell her in detail how to correct it?

A. No, I couldn't. I wouldn't, anyway.

Q. In other words, you, as you testified here, would carry out the agreement?

A. Yes, sir.

Q. She had agreed to operate the cookhouse in a satisfactory manner? A. Yes, sir.

Mr. Davidson: That is all.

Redirect Examination

By Mr. Scott:

Q. When you said you would not give Mrs. LeCompte detailed [88] instructions as to the meals, you meant by that that she is a good enough cook that she, herself, would know what changes to make without your explaining them to her?

A. I think so, yes, sir.

Mr. Scott: That is all.

(Witness excused.) [89]

MRS. EDITH LeCOMPTE

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scott:

Q. You are Mrs. Edith LeCompte?

(Testimony of Mrs. Edith LeCompte.)

A. Yes, sir.

Q. At the present time what work are you engaged in performing?

A. Cook at the Row River Lumber Company cookhouse.

Q. How long have you been cook at the Row River Lumber Company cookhouse?

A. Since May 1, 1945.

Q. Whom did you originally talk with when you went to work as cook? A. Mr. Bebe.

Q. Did Mr. Bebe seek you out or did you go to Mr. Bebe?

A. Mr. Bebe called me on the telephone.

Q. What did Mr. Bebe say to you?

A. He asked me if I would be interested in running the cookhouse.

Q. Did he say the company wanted to hire you to run the cookhouse?

A. Hire me to run the cookhouse?

Q. Yes. A. The company? [90]

Q. Yes. A. No, sir.

Q. Was the agreement between you and Mr. Bebe written or oral? A. Oral.

Q. For what length of time is that agreement with the company made to run?

A. No time at all.

Q. Was anything said at the time you talked to Mr. Bebe as to the means by which the agreement could be terminated? A. No, sir.

Q. Or would be terminated? A. No, sir.

Q. So far as you know, under the agreement, may the company terminate your services at any time?

(Testimony of Mrs. Edith LeCompte.)

A. Why, I suppose they could.

Q. Is your answer yes? A. Yes, sir.

Q. Is any notice necessary for terminating your services under the agreement?

A. Nothing was said about it.

Q. Your answer is no? A. No.

Q. Under the agreement can you quit any time you want to? A. Yes, sir. [91]

Q. Do you have to give the company any notice before you will quit?

A. Well, nothing was said about that, but I would.

Q. You would, but would you have to, if you did not want to? A. I don't think so.

Q. Your answer is no? A. No.

Q. In the operation of the cookhouse, did you furnish any equipment whatsoever, or do you furnish any equipment whatsoever?

A. No, sir, not the kitchen and dining room.

Q. In the living quarters of yourself and your family, do you furnish any equipment there?

A. It is mine, yes.

Q. Is all the furniture and furnishings in your living quarters your own? A. Yes, sir.

Q. The company furnishes none of those?

A. No, sir.

Q. But as to the kitchen and dining room, you furnish no equipment or fixtures or equipment of any kind? A. No, sir.

Q. Is any charge made against you for the use of the kitchen, dining room and your living quarters?

A. No, sir. [92]

(Testimony of Mrs. Edith LeCompte.)

Q. Under your arrangement with the company, what duties were you expected to perform?

A. I was to run the cookhouse.

Q. You were to run the cookhouse?

A. Yes, sir.

Q. In the operation of the cookhouse were you to furnish meals to any employees of the company who chose to eat there? A. Yes, sir.

Q. Was it part of your duty under your agreement to furnish meals to a person, even though you might not personally like him?

A. As long as he was a gentleman in the place, why, I would feed him.

Q. Could you refuse to serve a meal to an employee of the company, even though he was a gentleman but, for some reason, you just did not want to serve a meal to him under your arrangement?

A. I don't know. That has never come up.

Q. So far as you know at the present time, your duty is to furnish meals to all the employees who choose to eat at the cookhouse? A. Yes, sir.

Q. Do you serve meals to non-employees at the cookhouse? A. Yes, sir.

Q. Whom do the non-employees consist of? [93]

A. Well, it might be to somebody — Well, say transients, somebody going up the river. I would not ask who they are.

Q. About what would your income be a month from meals served to non-employees?

A. That I don't know. I would have to look at my statements. My statements show that. I couldn't tell you.

(Testimony of Mrs. Edith LeCompte.)

Q. About how many transients per month eat at the cookhouse?

A. Well, that varies. I don't think I could even estimate it.

Q. Would you be able to estimate the amount of income, then, from the transient trade?

A. From the transients, well, it would be around \$15 or something like that.

Q. The rest of the money you receive would be from meals furnished to the employees of the company?

A. No, sir. I have some boarders that work other places. I was free to take those in if I liked. I do not consider those people transients.

Q. When you talk about boarders, exactly who are they? A. They are working people.

Q. Working for the Row River Lumber Company?

A. No, sir. Some were outside people. They worked for other companies.

Q. How many boarders did you have?

A. Well, at present I have ten steady boarders and—

Q. You mean ten people who do not work for the Row River [94] Lumber Company?

A. No, they work for the Row River Lumber Company. I do not have but one—

Q. You just have one boarder?

A. One person.

Q. One person who eats with you that does not work for the Row River Lumber Company?

A. Yes.

(Testimony of Mrs. Edith LeCompte.)

Q. Other than the transients and this one boarder, is all the rest of your income derived from meals served employees of the Row River Lumber Company? A. At the present time, yes.

Q. At the present time? A. Yes.

Q. When did you start cooking for the Row River Lumber Company?

A. The first day of May, 1945.

Q. Prior to that time had you cooked for other lumber companies? A. Yes, sir.

Q. In your experience as a cook at lumber camps, for the Row River Lumber Company and other companies, prior to 1945, have you acquired experience that enables you to run a cookhouse without supervision? A. Yes, sir. I think so. [95]

Q. I beg your pardon? A. I think so.

Q. You consider yourself an excellent cook?

A. No, I wouldn't say that.

Q. A very good cook? A. Fair.

Q. But you do know how to run a cookhouse at a lumber camp without direct supervision from the outside? A. I think I do.

Q. Do you purchase the food that you serve at the cookhouse? A. Yes, sir.

Q. Do you hire your own help? A. Yes.

Q. How many helpers do you have at one time?

A. One.

Q. In the operation of a cookhouse, could you give, briefly, what you have to do? You buy your own food? A. Yes, sir.

Q. Prepare your own food? A. Yes, sir.

Q. You set the tables and serve the food?

(Testimony of Mrs. Edith LeCompte.)

A. I do not set the tables. My helper sets the tables.

Q. What other duties does your helper perform besides setting the tables?

A. She does all the dining room work and carries the food [96] onto the tables after it is dished up, and peels the potatoes. That is her duty.

Q. Does she do anything else?

A. And wash dishes.

Q. Does she make the toast?

A. She makes the toast, yes.

Q. Do you do anything besides cooking the food and buying the food?

A. Well, I do all my work there.

Q. Do you help your kitchen helper wash the dishes?

A. No, sir, that is her duty. I don't do that.

Q. Are buying the food and preparing the food your main duties? A. Yes.

Q. Do you ever buy food or charge food in the name of the Row River Lumber Company?

A. Those potatoes you spoke of, that was during the war when potatoes and everything was hard to get, and I had them to get those potatoes for me here; they were shipped down to me and I paid for those myself out of my own money. That money was coming to me; that was held out.

Q. I hand you Plaintiff's Exhibit No. 4 and ask you to look at that exhibit. I will ask you some questions about it. This exhibit comprises several statements. Are these prepared by the Row River Lumber Company and given to you with your check?

(Testimony of Mrs. Edith LeCompte.)

A. They come with my check, yes, sir.

Q. Those statements are prepared by the company?
A. As far as I know.

Q. You do not prepare them and submit them to the company?
A. No, sir.

Q. So far as you know, the company prepares them and gives them to you with your monthly check?

A. Whatever men they have working for them.

Q. I show you a statement with the number 5016, dated July 12, 1945, which contains the entry "Less two sacks potatoes, \$8.02," and ask you to explain that entry.

A. That is when potatoes were hard to get and we could not buy them in small towns and they could buy them up here, so I sent up here for these potatoes and they were sent down to me, and, instead of my just spending the money, it was held out of what money was coming to me.

Q. Who did you send up to get the potatoes for you?

A. I had Carl Shoberg to phone to Portland. I don't know where he bought them.

Q. Mr. Shoberg works in the office of the Row River Lumber Company?
A. Yes, sir.

Q. At the camp?
A. Yes, at the camp.

Q. The two sacks of potatoes were delivered to you and the [98] amount \$8.02 was deducted?

A. Deducted from my money that was coming to me.

Q. I hand you a statement with the number 4986 on it, dated June 13, 1945, and ask you what the entry "Two sacks of potatoes, \$8.68" means.

A. Means the same thing as the other one.

(Testimony of Mrs. Edith LeCompte.)

Q. You could not get potatoes down there, so you asked the company to get the potatoes for you in Portland? A. Yes, sir.

Q. Also this same statement, No. 4986, dated June 13, 1945, shows the entry "Draw 6/5/45. \$200." I will ask you what that entry means?

A. Well, that is the only money I ever went and drew. That money was coming to me. I have—I could have gotten the whole thing if I had asked for it, what was coming to me. I needed it. I had promised to pay a bill and I like to keep my word, so I just drew \$200.

Q. You drew \$200 from the company?

A. Yes.

Q. This advance of \$200 was so you could pay this bill you are talking about?

A. I had already earned this money, but before my first pay day—

Q. Yes.

A. —I didn't understand pay day was on the 15th, so I [99] wanted to pay a bill and I asked for that. You will notice on all my statements that is the only draw that has ever been on it.

Q. But that draw was a draw that you got from the company for money due you prior to the regular pay day? A. Yes.

Q. I hand you Statement No. 29, dated August 13, 1945, and ask you to explain the entry "Less R. E. Lafferty & Sons, \$8.20"?

A. That is a wholesale house. I couldn't buy shortening so that was bought for me and sent down.

Q. Who paid it for you?

A. I don't know that. The best I remember, it came from the express office over in Cottage Grove.

(Testimony of Mrs. Edith LeCompte.)

Q. Did you ask the Row River Lumber Company to pay it for you, to buy this shortening for you, and sent it to you? A. Yes.

Q. You say yes?

A. The same as the potatoes, yes.

Q. You asked Mr. Shoberg to order it for you?

A. I think so.

Q. Was your answer "yes" that you asked Mr. Shoberg to order it for you? A. Yes.

Q. I show you Statement No. 96, dated 10/12/45, with the [100] entry "Less: 12 3-lb. jars Spry, \$8.16," and ask you what that entry means.

A. The same as the others.

Q. You needed some Spry? A. I did.

Q. You were unable to get it and you asked Mr. Shoberg to order it for you?

A. I don't remember who got that for me, those three jars.

Q. You asked Mr. Shoberg to arrange to get it for you from Portland?

A. I don't remember that.

Q. How come it is on the company's statement?

A. I don't remember who I asked to get it.

Q. But you did ask somebody? A. Yes.

Q. Somebody working for the company to get the Spry for you? A. Yes, sir.

Q. I also show you a statement dated 11/13/45 with the entry "Less: 10 3-lb. jars Spray at 68 cents, \$6.80." A. The same thing.

Q. The same thing? A. Yes.

Q. Also, Statement No. 159 dated 12/11/45 with the entry "Less: 36 pounds shortening, \$7.68."

(Testimony of Mrs. Edith LeCompte.)

A. The same thing. [101]

Q. Did the company have any objection to ordering this merchandise for you? A. No, sir.

Q. Those commodities? A. No, sir.

Q. You said you talked to Mr. Bebe when you first arranged to become a cook at the Row River Lumber Company? A. Yes, sir.

Q. What was said at the time about the amount you would get per meal, if anything?

A. He told me the price they were getting and that is the way it was undertaken.

Q. When you first started as cook in May, 1945, and up until August, 1946, the price of the meals was 55 cents, is that right?

A. I believe so, yes, sir.

Q. Then, in August, 1946, when the price was increased to 65 cents, what were the circumstances or what was the occasion for increasing the price of meals at that time? Did you go to the company and talk to them about increasing the price of meals?

A. Yes. Well, Mr. Bebe asked—I asked him to increase the price of meals due to the raise in prices.

Q. What did Mr. Bebe say?

A. We all got together and talked it over, and that is what [102] we did, and they decided that they would give me the raise.

Q. On September 9, 1947, the price of meals was increased to 75 cents. Do you recall the circumstances resulting in that increase?

A. Yes, sir, it would be the same proposition.

Q. The same proposition? You went and asked if you could increase the price? A. Yes, sir.

(Testimony of Mrs. Edith LeCompte.)

Q. It is your understanding under this arrangement with the company that the approval of the company must be obtained to increase the price of meals served company employees?

A. No, sir, I don't think so. We all talked it over, however, and it was agreed with all of us.

Q. I didn't ask you that. Was it your understanding that you would have to talk it over with the company and get the company's approval before you could increase the price?

A. Yes.

Q. Your answer is yes?

A. Yes.

Q. Under this arrangement with the company to furnish meals, do you select your own menus?

A. Yes.

The Court: Meat and potatoes in a logging camp and lots of dessert; two kinds of dessert, maybe three.

Mr. Scott: Q. Is it your understanding under the arrangement [103] with the company that the meals must be satisfactory to Mr. Bebe?

A. No, sir.

Q. Isn't it your understanding, under your arrangement with the company, that the cookhouse and dining room must be operated to the satisfaction of Mr. Hayes and Mr. Bebe?

A. Well, I guess so, yes, sir.

Q. Your answer is yes?

A. Yes, sir.

Q. Would that mean that the meals you serve would have to be satisfactory to Mr. Hayes and Mr. Bebe?

A. I don't think so.

Q. What do you mean when you say that is your understanding—

(Testimony of Mrs. Edith LeCompte.)

A. I run the cookhouse myself, and I was my own boss and I served what I pleased.

Q. I hand you here what has been marked Plaintiff's Identification No. 5 and ask you if that is a statement signed by you? A. Yes, I signed it.

Q. You signed that? A. Yes, sir.

Q. Would you read this paragraph (indicating) in your statement, please. Read it to the Reporter. Read it out loud.

A. "It is my understanding that the cookhouse and dining room must be operated to the satisfaction of Mr. Hayes and Mr. Bebe whom I consider as my bosses. Our agreement for [104] the operation of the cookhouse and dining room is not for any definite length of time and is dependent upon mutual satisfaction. I can quit at any time I may wish."

Q. Read that again.

A. "I can quit at any time I may wish, and Mr. Hayes and Mr. Bebe can terminate my services at any time they may wish to do so."

Q. Is that statement correct? Is that still your statement? A. Yes, sir.

Q. That is your statement at the present time as testimony in this trial?

A. At this present time?

Q. Yes.

A. I wasn't under oath when that was signed. I was aggravated to sign that and pestered.

Q. I didn't ask you that.

Mr. Scott: I move that her answer be stricken.

The Court: Young man, you are impeaching your own witness.

(Testimony of Mrs. Edith LeCompte.)

Mr. Scott: I am not trying to impeach her.

The Court: What are you trying to do?

Mr. Scott: May I ask her if that is her testimony at the present time?

The Court: You are trying to impeach your own witness. She gave testimony as to what she did and you are trying to show to the contrary, according to a statement she previously [105] made. You are bound by the testimony she has given here. You called her.

Mr. Scott: Yes.

The Court: You vouched for her.

Mr. Scott: Yes.

Q. Is that your statement? A. Today?

Q. Yes.

A. No, sir, that is the one I signed when I was pestered to sign it.

Q. You said a while ago, I believe, that the cookhouse and dining room must be operated to the satisfaction of Mr. Hayes and Mr. Bebe?

A. Will you repeat that to me, please?

(Question read.)

A. Yes, sir.

Q. In what capacity do you consider Mr. Hayes and Mr. Bebe in relation to the operation of the cookhouse?

A. Well, they are the company that I operate the cookhouse for and I am protected, through them, of getting the board money from the employees that board there.

Q. You stated a while ago that Mr. Hayes and Mr. Bebe could terminate your services at any time?

(Testimony of Mrs. Edith LeCompte.)

A. Yes, sir.

Q. If the food you serve out there did not meet the satisfaction [106] of Mr. Hayes and Mr. Bebe, they could terminate your services immediately under the arrangement, is that right?

A. Nothing like that was ever talked over.

Q. I am just asking you if, under the arrangement you have, if the meals you serve were not satisfactory to Mr. Hayes and Mr. Bebe they could terminate your services?

A. I would say they could, yes, sir.

Q. In your operation of the cookhouse, you try to serve food which will meet the satisfaction of Mr. Hayes and Mr. Bebe?

A. Yes, sir, and the boarders.

Q. And the boarders? A. Yes, sir.

Q. You said a while ago that you did not think you had to serve food to meet the satisfaction of Mr. Hayes and Mr. Bebe. Did you mean that there had never been anything said about it specifically, or that you do try to serve food that meets their satisfaction? Is that what you meant to say?

A. Yes, sir. That is what I tried to do—what I try to do.

Q. Do Mr. Hayes and Mr. Bebe ever come over to the cookhouse to inspect the way it is being operated?

A. They never did come in and say they came to inspect the cookhouse, no.

Q. They do come over there for meals?

A. Yes, sir.

Q. You live with your family at the cookhouse?

(Testimony of Mrs. Edith LeCompte.)

A. Yes.

Q. What does your family consist of?

A. My husband and daughter.

Q. Your husband and daughter help you around the cookhouse?

A. My husband does.

Q. What does your husband do?

A. Carries in the wood.

Q. Does your daughter help you at all?

A. No, sir; she is lazy.

Q. The company furnishes all the water, light and fuel for operating the cookhouse, is that true?

A. Yes.

Q. When you want a load of wood for the cookhouse, whom do you ask and what procedure do you go through to get the wood?

A. The man that delivers the wood.

Q. Do you ask the man who delivers the wood?

A. My husband does. I don't, but it is for me.

Q. It is for you?

A. Yes.

Q. Who pays for the wood?

A. The company, as far as I know.

Q. Do you tell the company that you have purchased a load of wood or does the person who delivers the wood notify the company?

A. He has a ticket and that is supposed to be signed by me or [108] my husband, showing that he delivered a load of wood to the cookhouse. That is all it is for.

Q. So far as you know, he turns the ticket over to the company when they pay him for it?

A. That is all I know about it. I get the wood, and that is all.

(Testimony of Mrs. Edith LeCompte.)

Q. Who is your kitchen helper at the present time? A. Thelma Dewitt.

Q. How long has she been your helper?

A. Since July 7th.

Q. Do you know how many hours per week Thelma Dewitt works?

A. Well, with the crew we have now, it is about thirty-nine and a half hours.

Q. A week?

A. Yes, sir. That is to the best of my knowledge. I don't keep no time on her, but I could very easily figure it out.

Q. Would you figure it up, please? When is breakfast served? A. 6:25.

Q. Does Thelma Dewitt help you prepare the breakfast? A. Just the toast.

Q. Just the toast? A. Yes.

Q. What time does she have to begin work to prepare the toast? What times does she have to begin work to prepare the toast at breakfast, do you know? [109] A. 6:00 o'clock.

Q. Does she set the table for breakfast?

A. The evening before, yes, sir. She does all the dining room work.

Q. After she begins work at 6:00 o'clock, how long does she work before she is off?

A. 8:00 o'clock, around 8:00 o'clock.

Q. Is she off at 8:00 o'clock then?

A. Off at 8:00 o'clock?

Q. Yes. A. Yes, sir.

Q. When does she go back to work again?

A. 11:00 o'clock.

(Testimony of Mrs. Edith LeCompte.)

Q. How long does she work then?

A. Well, she is usually through about a quarter to 2:00.

Q. Then when does she return to work?

A. 5:00 o'clock.

Q. When does she cease working for the day?

A. 7:00, around 7:00 o'clock.

Q. How many days per week do you operate the cookhouse?

A. Seven days a week, only if they should check out, I don't have to operate the cookhouse on Sunday.

Q. When they all check out, you do not have to operate it on Sunday? A. That is right.

Q. How many weeks per month is it that they all check out and you do not have to operate the cookhouse on Sunday? A. I don't know; very few.

Q. Very few times you do not have to operate the cookhouse on Sunday? A. Yes.

Q. From the figures you just gave me, Miss Dewitt would work there six and three-quarter hours.

A. She goes home by 1:00 o'clock on Saturday and does not return to work until Monday morning.

Q. Is that every week that she does that?

A. Every week.

Q. When do you begin work in the morning?

A. 5:00 o'clock except Saturday and Sunday.

Q. After you begin work at 5:00 o'clock, how long do you work before you have a rest?

A. Well, I am on the job until about 1:00 o'clock.

Q. Until about 1:00 o'clock?

A. Yes. However, I am not working steady all

(Testimony of Mrs. Edith LeCompte.)

that time, but I am there. Because I am my own boss, I thought I could do as I pleased.

Q. Do you know how many hours you work a week? A. No, sir.

Q. Could you make some kind of a statement or estimate as to how many hours you work a week?

A. No, sir, I couldn't.

Q. You work over 40 hours a week?

A. Oh, I think so.

Q. Every week?

A. Every week that I am there.

Q. Every week you are there you work over 40 hours a week. Would you have any idea how many hours you work in excess of 40 hours a week? Is it at least 10 or at least 5? A. I don't know.

Q. You say you start to work at 5:00 o'clock and then you cease working when?

A. At 1:00 o'clock.

Q. At 1:00 o'clock? A. Yes.

Q. Then when do you begin work again?

A. 4:00 o'clock.

Q. And you work until when?

A. I am usually through by 7:00 o'clock now.

Q. You are usually through by 7:00 o'clock?

A. The work varies and the hours vary. The more boarders you have the more hours you have to put in.

Q. On Saturday and Sunday when do you begin work?

A. On Saturday I begin my work at 5:30.

Q. And you work until when?

A. Well, it would be 1:00 o'clock, the same as the other days. [112]

(Testimony of Mrs. Edith LeCompte.)

Q. Then when do you come back to work?

A. 4:00 o'clock.

Q. And then you work until when?

A. Then I am usually through around 6:00 o'clock.

Q. You work the same hours on Sunday, do you, or do you work different hours on Sunday?

A. Shorter hours on Sunday. It is according to how many people I cook for.

Q. What would be a usual Sunday?

A. Well, I do not begin my work on Sunday until 6:30.

Q. When do you stop work?

A. Then I would be through by one o'clock. I would be there all the time but I would not work all the time.

Q. Is it necessary that you remain in the cook-house?

A. I could go out for a half hour or so, if I wanted to, on Sunday morning.

Q. On Sunday morning? A. Yes, sir.

Q. On the other mornings, though, when the mill is operating, and on Saturday mornings, it is necessary that you be in the cookhouse all the time you say you are there?

A. It would work the same way on Sunday because there isn't so many men to cook for.

Q. During the five days that the mill is running, are you always in the cookhouse during those hours that you stated? [113]

A. That I am working, is that what you mean?

Q. Yes. A. Yes.

(Testimony of Mrs. Edith LeCompte.)

Q. From 5:00 to 1:00 and from 4:00 to 7:00?

A. Yes.

Q. You are working in the cookhouse the five days during all that time? A. Yes.

Q. And on Saturdays you work in the cookhouse from 5:30 until 1:00 and from 4:00 to 6:00?

A. Yes.

Q. And on Sundays you work about the same as on Saturdays? A. About the same.

Q. About the same? A. Yes.

Q. How long have you worked those hours that you have just stated?

A. Well, that is hard to say.

Q. Since you began work in May, 1945, have you always worked about that many hours?

A. No, I would say the last year the hours have been shorter.

Q. Prior to the last year, you worked longer hours than those you just stated? A. Yes.

Q. Who was your kitchen help prior to Thelma Dewitt? Who was [114] your kitchen helper prior to her? A. Shirley Radcliffe.

Q. When did she begin working for you?

A. The first part of April, I think.

Q. 1947? Would that be April, 1947?

A. Yes.

Q. How many hours a week did she work?

Mr. Davidson: I am going to object to this line of testimony, your Honor. This proceeding is to enjoin the continued violation by the company. Something that happened to an employee who is no longer there would be irrelevant in this case.

(Testimony of Mrs. Edith LeCompte.)

The Court: How long ago was it?

Mr. Davidson: This was two years ago.

Mr. Scott: It is a year ago.

The Court: You may inquire.

Mr. Scott: Q. Do you know how many hours Miss Radcliffe worked during the week?

A. I couldn't say that. I didn't time her at all. She was a very slow person, so I couldn't say. That is out of the question.

Q. Did she work over 40 hours a week?

A. I don't know.

Q. Do you have any idea whether she worked over 40 hours a week? A. No. [115]

Q. Do you know when Shirley Radcliffe began work in the morning? A. Came to work—

Q. When did she begin her work?

A. She worked the same as the other girl, the same as the girl that works for me now.

Q. You mean just thirty-nine and a half hours a week?

A. I don't know about that. I think she went to work at the same time as Miss Dewitt.

Q. She began work at the same time?

A. Yes.

Q. That would be 6:00 o'clock in the morning?

A. Yes.

Q. And she would work until when?

A. That I don't know. I didn't pay any attention to her. I just let her work and do her work as slow as she wanted to do it.

Q. Did you have a kitchen helper named Edith Ponton? A. Edith Ponton, yes.

(Testimony of Mrs. Edith LeCompte.)

Q. When did she work for you, do you recall?

A. I don't know. I would have to have my books on that to answer these questions directly.

(A short recess was then taken.)

Mr. Scott: Q. Mrs. LeCompte, as to your statement as to the daily hours you worked, which you said was from 5:00 to [116] 1:00, 4:00 to 7:00, five days a week, and 5:30 to 1:00 and 4:00 to 6:00 on Saturdays and Sundays, how many hours do you work a week now?

A. I don't know. I don't want to figure it up. You figure it up.

Q. From 5:00 to 1:00 and 4:00 to 7:00, that would be eleven hours for five days a week; 5:30 to 1:00 and 4:00 to 6:00, two days a week, would be nine and a half, or a total of 74 hours a week. Is that correct?

A. I don't work those hours on Sunday, every Sunday.

Q. But you do work some Sundays?

A. Some Sundays. I don't know if I can tell you how many. During the month I wouldn't be able to tell you how many.

Q. But the only days on which those hours are varied would be on Sunday? A. Yes.

Q. I think you said you worked those hours for about a year and, prior to that, you worked a little longer, is that right? A. Yes.

Q. Are you paid any money by the Row River Lumber Company other than the money which you receive for the meals that you serve the employees at the cookhouse? A. No, sir.

(Testimony of Mrs. Edith LeCompte.)

Q. Are you paid any extra compensation as overtime by the Row River Lumber Company for hours worked in excess of 40 per week? [117]

A. No, sir.

Q. Do you keep a record of the hours you work and the amount of money you receive from the Row River Lumber Company?

A. I don't keep a record of the hours, but my statements show what I receive; that money that is held out from the boarders, that is all I receive.

Q. Do you turn in a record of your daily and weekly hours?

A. No, sir.

Q. To the Row River Lumber Company?

A. No, sir.

Q. How much do you pay your present kitchen helper?

A. \$100 a month, board and room.

Q. How much have you paid your previous kitchen helpers, do you recall?

A. The same.

Q. \$100 a month?

A. Board and room.

Q. Plus board and room?

A. Yes, sir.

Q. Do you ever pay them anything additional, any additional money as overtime compensation?

A. No.

Q. In the event they worked over 40 hours a week?

A. No, sir.

Q. Did you ever keep a record of their daily and weekly hours [118] worked?

A. No, sir.

Q. Did you ever turn in such a record to the company?

A. No, sir.

Q. Is the time that you begin work and cease work—the time that you begin and the time that you work during the day and the time that you cease

(Testimony of Mrs. Edith LeCompte.)

work at the end of the day, is that dependent upon the time that you serve your meals? Is that right?

A. My meals are all served at certain times in the day.

Q. That is what I mean. A. Yes, sir.

Q. The time you serve your meals is dependent upon the starting and quitting time of the mill and the woods employees, is that right?

A. Yes, sir.

Q. Do you take a vacation every year, Mrs. LeCompte? A. Yes, sir.

Q. When you go on a vacation, do you arrange for a cook to substitute for you? A. Yes, sir.

Q. Have you ever been ill since you became cook so that it was necessary for you to have a substitute? A. No, sir.

Q. When you arrange for a substitute when you go on a vacation, [119] do you have to talk to Mr. Bebe or Mr. Hayes and get their approval?

A. No, sir.

Q. The operation of the cookhouse passes from you to the substitute without any interference or intervention by the company? A. Yes, sir.

Q. Have you ever wanted to take a vacation and the company would not let you take it at the time you originally wanted to? A. No, sir.

Q. Are you free to serve transients without the company's approval? A. Yes, sir.

Q. Are most of the transients you serve those people that have other business with the company?

A. Not that I know of, sir.

(Testimony of Mrs. Edith LeCompte.)

Q. How much do you charge transients for meals? A. 75 cents.

Q. I think you said that the amount you obtained from transients per month amounts to about \$15? A. Something like that, yes.

Q. I hand you Plaintiff's Exhibit No. 4, taking as an example the statement with the number 224 on it with the date 2/12/46; the statement shows 1,584 meals were paid for at a price of 40 cents and 1,712 meals were paid for at a price of 15 cents bonus. Would you state why there is a larger number of meals paid for at the bonus than meals for which deductions were made?

A. To the best of my knowledge, all those odd meals were paid in cash to me for whatever I was getting for a meal.

Q. By the employees?

A. No, by the boarders themselves.

Q. That is what I mean.

A. This 15 cents is paid by the company as a bonus.

Q. In other words, if an employee so chooses, he can pay the amount of the payroll deduction to you in cash and not have it deducted from his wages? A. Yes, sir.

Q. But, in that event, the company still pays you the amount of the subsidy for that meal?

A. Yes, sir.

Q. There are several other statements in this exhibit in which the same situation exists, that there will be more meals for which subsidy is paid than

(Testimony of Mrs. Edith LeCompte.)

for which payroll deduction is made. Is your explanation in those cases the same?

A. Yes. If the boys pay cash for meals, then the company pays the 15 cents, or whatever it was, bonus on top of that. They pay that themselves.

Q. There is also an entry on that statement, No. 224, dated 2/12/46 which shows "65 meals at 55 cents, \$35.75." What does that entry represent? [121]

A. That is company meals, eaten by company men.

Q. Eaten by company men other than employees?

A. Mr. Hayes and Mr. Noyes and others that they might bring.

Q. Those are officers of the company?

A. Officers, yes. That is what it is.

Q. I will show you a statement in Plaintiff's Exhibit No. 4 with the number 834 on it, dated August 11, 1947, which contains the entry: "17 meals at 50 cents (Youngblood & Martin)" and ask you what that entry represents?

A. That is the bonus paid on the meals where the boys paid cash for the other.

Q. The Youngblood & Martin entry, I am talking about, 17 meals at 50 cents, Youngblood & Martin. Does that entry represent meals furnished to a contractor with the company named Youngblood & Martin?

A. Employees of Youngblood & Martin.

Q. Or employees of Youngblood & Martin?

A. Yes.

(Testimony of Mrs. Edith LeCompte.)

Q. Are Youngblood & Martin performing some work for the company?

A. I don't know anything about that.

Q. As to these employees of Youngblood & Martin, did the company ask you if they could come over and eat in the cookhouse?

A. No, sir. [122]

Q. They just came over and ate in the cookhouse?

A. I made arrangements with them.

Q. You made arrangements with them?

A. Yes. It was understood they would pay me the cash.

Q. What I mean is this: Did the company ask your approval if you would furnish meals to employees of Youngblood & Martin?

A. No, sir.

Q. In addition to the meals that you served employees of the Row River Lumber Company in the cookhouse, you also served some lunches?

A. Yes, sir.

Q. What employees are those lunches prepared for?

A. Employees of the Row River Lumber Company.

Q. Are they the employees who work in the woods?

A. Yes.

Q. How many lunches do you prepare?

A. Now I am preparing three.

Q. How many have you prepared in the past?

A. Oh, I would say eighteen.

(Testimony of Mrs. Edith LeCompte.)

Q. How long ago was it you were preparing eighteen lunches a day?

A. Oh, I don't know.

Q. Do you have some idea?

A. It might have been two years ago. I don't know.

Q. But you have prepared as high as eighteen?

A. Yes, sir, I have.

Q. When employees of Youngblood & Martin ate at the cookhouse, were they charged the same price as employees of the Row River Lumber Company for their meals? A. Yes, sir.

Q. Were you told that they should be charged the same price? A. No, sir.

Q. Nothing was said whatsoever about getting your consent to have these employees eat at the cookhouse? A. No.

Q. When the arrangement was made between you and Mr. Bebe for you to be the cook at the cookhouse, was anything said that you should lease the cookhouse from the company? A. No, sir.

Q. Was anything said as to whether or not you would be an employee or a contractor for the company? A. I don't understand the question.

Q. When you originally made your oral agreement with Mr. Bebe, what did he say as to whether you would be an employee or a contractor of the company?

A. I would work for myself, if that is what you mean.

Q. Did he specifically say you would work for

(Testimony of Mrs. Edith LeCompte.)

yourself, or is that what you have come to learn since then? A. I would be running it myself.

Q. That was your understanding at the time?

A. Yes.

Q. Since the company sets the amount that you can charge for a meal, does that limit the profit that you can make from the operation of the cook-house?

A. Well, the more you can charge for a meal the more you can make.

Q. That is right. Would the answer be, then, Yes, that the company does set a limit on the amount of profit you can make by setting the amount you can ask for your meals?

A. Nothing was ever said about that. The price was set for the meals and that is all there was to it.

Q. That is all there was to it? A. Yes.

Q. You cannot charge any more than the price set for the meals? A. Not to the employees.

Q. Since you have been cook at the Row River Lumber Company from 1945, have you cooked there regularly and constantly? A. Yes, sir.

Q. The nature of your work has not been that you can cook when you please and not cook when you please?

A. Well, it takes so long to prepare a meal. It is the same every day.

Q. You do not work just casually, when you want to, and not work down there when you don't want to work? You work there regularly and steadily every day? [125] A. Why, sure.

(Testimony of Mrs. Edith LeCompte.)

Q. Since you began cooking for the Row River Lumber Company in 1945, have you cooked for any other company? A. No, sir.

Q. Since you originally began cooking for the Row River Lumber Company in 1945, have you held yourself out to other lumber camps as being in the market for a contract to cook for them?

A. No, sir.

Q. Have you not shifted your services from camp to camp since you began cooking at the Row River Lumber Company? A. No.

Q. But you have worked for them constantly?

A. Yes.

Q. Under the original agreement, when you first began cooking for the Row River Lumber Company, you said there was no term for which the agreement was to run? A. No, sir.

Q. You did not agree to work for any specified season or for a specified year or anything like that?

A. Oh, no, sir.

Q. There has been only one cook at a time cooking at the cookhouse? A. Yes, sir.

Q. You perform all your work in the cookhouse furnished by the Row River Lumber Company? [126] A. Yes, sir.

Q. Other than the approximately \$15 you receive from transients per month and this one boarder, you receive all the rest of your money for meals furnished the employees of the Row River Lumber Company?

(Testimony of Mrs. Edith LeCompte.)

A. No, sir, other boarders; I may take in other boarders.

Q. Yes, ma'am, but I am saying at the present time you just have that one boarder?

A. Well, I don't know whether I have him or not. He is in the hospital.

Q. About how much money do you take in a month for meals served to persons other than employees of the Row River Lumber Company?

A. I don't remember. It is down in a lump sum. At the end of the year it shows. You have it there, and as for telling you how much a month, I can't.

Q. I hand you what has been marked for identification No. 6 and ask you what that book is?

A. This is an expense account, each month since I have been with the Row River Lumber Company cookhouse.

Q. Does that contain all the expenditures, all the expenses that have been incurred for the purchase of food and for help? A. Yes, sir.

Q. Does that also show the amount of profit that you make at the end of each month? [127]

A. Not all of it. The little slip of paper does.

Q. What little slip of paper are you talking about? A. That you have.

Q. You are referring to Plaintiff's Exhibit No. 4, is that correct?

A. No, the little slip of paper.

Q. That you gave the inspector?

A. That shows the yearly cash. That is it. This

(Testimony of Mrs. Edith LeCompte.)

is for each year, cash money, and the company has nothing to do with this.

Q. I hand you what has been marked Plaintiff's Identification No. 7 and ask you to identify it.

A. You want me to explain this?

Q. Yes.

A. It shows the cash money that I receive from outside boarders and transients, other than the Row River Lumber Company men for each year. Shall I state the amount?

Q. Yes; please state the amount.

A. 1945 was \$191.80; 1946 was \$324.50; and 1947 was \$544.05.

Q. As I understand it, then, Mrs. LeCompte, Plaintiff's Identification No. 7 is the cash that you have received in addition to the payments?

A. What shows on my statement, yes.

Q. In addition to the payment shown on Exhibit No. 4 of the plaintiff?

A. Sometimes it shows some cash on there that they don't know [128] anything about.

Mr. Scott: I offer this slip in evidence.

Mr. Davidson: Does that purport to be an original record?

Q. (By Mr. Scott): Is this an original?

A. An original, yes.

Mr. Davidson: It is not explained.

Mr. Scott: She has explained it.

Mr. Davidson: She can testify to what it is, but I object for the record. It is not admissible on any ground.

(Testimony of Mrs. Edith LeCompte.)

The Court: Admitted, subject to the objection.

(Memorandum in re cash received thereupon received in evidence and marked Plaintiff's Exhibit No. 7.)

PLAINTIFF'S EXHIBIT No. 7

| | |
|-----------|--------|
| 1945—Cash | 191.80 |
| 1946—Cash | 324.50 |
| 1947—Cash | 544.05 |

[Endorsed]: Filed March 8, 1948.

Q. (By Mr. Scott): I show you what has been marked Plaintiff's Identification No. 6, and ask you if those entries were made by you in that book?

A. Yes.

Q. Were they made at or about the time that the expenses were incurred which the entries represent?

A. At the end of each month all of my bills were added up and entered in this book.

Q. The monthly entries were made at the end of each month? A. Yes.

Q. Made by you in the ordinary course of your operation of the cookhouse, in the ordinary course of your keeping of your books? [129]

A. It is my records to show my expenses.

Q. Entries that you made?

A. That I made.

Q. In the operation of your cookhouse?

A. Yes.

Q. So far as you know, the entries are correct?

(Testimony of Mrs. Edith LeCompte.)

A. Yes, sir.

Mr. Scott: I offer in evidence Plaintiff's Identification No. 6, this expense book.

Mr. Davidson: No objection.

(Journal of Mrs. Edith LeCompte thereupon received in evidence and marked Plaintiff's Exhibit No. 6.)

Q. (By Mr. Scott): Where did you obtain the information contained in Plaintiff's Exhibit No. 7? Where did you obtain all those figures?

A. Cash paid to me from boarders.

Q. Did you obtain it from information contained in this book, Exhibit No. 6?

A. No. Do I understand the question?

Q. I don't know whether you do or not. What I want to know is, Where did you obtain the information that you got \$191.80 in 1945? From records kept by you?

A. The number of meals from outside boarders who paid in cash.

Q. Where are the records from which you obtained that information? [130] Is that information contained in this book here, Plaintiff's Exhibit No. 6? A. No, sir.

Q. I hand you Plaintiff's Exhibit No. 7 and ask you if you made that memorandum?

A. If I put these figures down?

Q. Yes. Are those your figures?

A. Yes; I told you a while ago I did. Still stand.

Q. At the time you put these figures down there,

(Testimony of Mrs. Edith LeCompte.)

were those figures compiled from information that had been kept by you as to your cash payments?

A. Yes, sir.

Q. At the time you put these figures on Plaintiff's Exhibit No. 7, did you know of your own knowledge that those figures were correct?

A. The amount that I received.

Q. Yes. A. Yes.

Q. You know of your own knowledge that these figures are correct as representing the cash payments you received during those years?

A. Yes, sir.

Q. The amounts shown on Plaintiff's Exhibit No. 7, do they include the amounts received solely from transients, or do they include some cash payments paid by the employees to you [131] for their own meals? A. Whose employees?

Q. Employees of the Row River Lumber Company?

A. No, sir; the Row River Lumber Company don't have anything to do with that. That is the boys I boarded from other places.

Q. The total amount of money you received from the operation of the cookhouse of the Row River Lumber Company would be the amount you received for meals shown on Plaintiff's Exhibit No. 4, together with the amount paid you by the company, plus the cash amounts shown on Plaintiff's Exhibit No. 7?

A. This right here; the Row River Lumber Company didn't pay that there.

(Testimony of Mrs. Edith LeCompte.)

Q. I am not talking about that, but I say: The amounts shown for meals entered on Plaintiff's Exhibit No. 4 are the amounts you received from the Row River Lumber Company?

A. You mean this right up here? Like this one right here, that was my check from the Row River Lumber Company. Maybe you don't understand my bookkeeping.

Q. Plaintiff's Exhibit No. 4, on Statement No. 224, the amount you received was \$926.15. Is that correct? A. Yes, that is right.

Q. Which represents the sum of the three figures here, showing the number of meals? A. Yes.

Q. Similarly, all the other statement in Plaintiff's Exhibit [132] No. 4, the amounts you received from the company are the amounts shown?

A. Yes.

Q. And when there might be some additional writing below, as for instance here (indicating), that is your writing?

A. Yes, sir. That is what I tried to make you understand. The company does not have—the company does not even know anything about that.

Q. In order to explain your bookkeeping, Plaintiff's Exhibit No. 6—I turn to Page 29, which is the account for November, 1946, and ask you if the figure \$721.26 is the amount of your expenses during that month? A. Yes, sir.

Q. And the figure below that would be your figure of how much you earned? A. Yes.

Q. And, similarly, on Page 47, that shows the

(Testimony of Mrs. Edith LeCompte.)

amount of expenses incurred by you during August, 1947, which was \$735.91? A. Yes.

Mr. Scott: That is all.

Cross-Examination

By Mr. Davidson:

Q. Mrs. LeCompte, in carrying on your business, in keeping your books, do you keep them on a strictly cash basis? In other words, you do not consider your inventories? [133]

A. Not on that book.

Q. If you bought heavily one month, your books might show a loss and, if you bought light the next month, they might show a profit? A. Yes, sir.

Q. You have no understanding as to any term of your agreement with the Row River Lumber Company, as I understand—as you testified?

A. No, sir.

Q. You would expect them to give you reasonable notice, in order to get rid of your inventory and so forth, if they were making a change, wouldn't you?

A. Yes.

Q. And you would expect to give them the same kind of notice, in order to contract with someone else, if you left? A. Yes, sir.

Q. Have you found them reasonable and co-operative to deal with? A. Yes, very much.

Q. I take it that at the present time your business is getting down to a pretty low ebb, isn't it?

A. Yes.

Q. The profit that you can make depends on the

(Testimony of Mrs. Edith LeCompte.)

prices that you can get for meals, taking into consideration the number of meals you can serve and what your food and labor costs you?

A. Yes. [134]

Q. Whatever you can do in getting more money for meals than what your food and labor costs, that is your profit? A. Yes.

Q. You are operating at all times on a definite amount per meal. Did you say that amount was agreed upon between you and the Row River Lumber Company, the amount per meal?

A. For employees?

Q. Yes.

A. Yes, sir. That was agreed by us three.

Q. Was that agreed between you—You mean between Mr. Hayes and Mr. Bebe and yourself?

A. Yes, sir.

Q. Was that price that was set agreeable to you when it was set each time? A. Yes, sir.

Q. Did you have your voice in determining what that ought to be? A. Yes.

Q. How many boarders do you think you had who were not employed by the Row River Lumber Company at the maximum time of steady work?

A. How many I have had?

Q. The most that you have had at any one time—boarders who do not work for the Row River Lumber Company?

A. At one time I think it was five, sir. [135]

Q. Five? A. Yes.

Q. According to this statement, Plaintiff's Ex-

(Testimony of Mrs. Edith LeCompte.)

hibit No. 7, which was just introduced in evidence, you had sales to persons who were not employees of the Row River Lumber Company in the amount of \$544.05 in 1947? A. Yes, sir.

Q. That would run, then, about \$45 per month at that particular time?

A. Well, it would average that.

Q. It would average that over the years?

A. Something like that.

Q. Will you explain the method that you used in advising the Row River Lumber Company office of the number of meals that they are to collect for.

A. I have a meal ticket.

Q. A meal ticket? A. Yes.

Q. Does it have the man's name on it?

A. Yes, the man signs it when he comes to the cookhouse.

Q. And you keep it there?

A. Yes, I keep a record each day.

Q. Each day? A. Yes.

Q. Do you punch the meal ticket? [136]

A. No, sir. They are just marked down and so-and-so has a meal ticket; the date and so forth is there.

Q. At the end of the month do you send them to the office?

A. At the end of the month these tickets go to the office.

Q. And that is the basis on which they make their charge to the men? A. Yes, sir.

Q. During the first month or first month and a half you were there, you drew \$200?

(Testimony of Mrs. Edith LeCompte.)

A. Yes, sir.

Q. Have you drawn any since then?

A. No, sir.

Q. Was there any money due you for meals for which the Row River Lumber Company was going to collect at the time you drew that \$200?

A. One month.

Q. You drew that in order to pay a bill contracted in your business?

A. Yes, I had a bill that I had promised to pay and I wanted to keep my word.

Q. Do you know anything about what Mr. Hayes likes to eat? A. No, sir.

Q. Do you plan your meals so there will be things that he likes? A. No, sir.

Q. Whom do you try to satisfy when you are putting out a meal? [137]

A. Everybody that eats with me.

Q. Are you concerned with satisfying anybody else? A. Oh, yes—Oh, no. I don't care.

Q. In other words, if you satisfy them, that would be a satisfactory operation of the cookhouse?

A. You mean if I satisfy whoever——

Q. If you satisfy the people that eat there.

A. Yes.

Q. If you don't satisfy them, they would not eat there? A. I don't think so.

Q. They are not compelled to eat there?

A. No, sir.

Q. You read certain parts of a statement that is handed to you. Will you tell me what that statement was?

(Testimony of Mrs. Edith LeCompte.)

A. I didn't get the question. Will you repeat it?

Q. Mr. Scott handed you a statement on yellow paper, during the course of his examination of you, and asked you if that was your statement, and you read certain parts of it. Do you remember that?

A. Oh, that I read myself?

Q. Yes.

A. Well, that paper—Mr. Faith came to the cookhouse.

Q. Who did that?

A. Mr. Faith, the gentleman here.

Q. The gentleman here? [137] A. Yes.

Q. He was an inspector for the Wage and Hour Division? A. That is what he said.

Q. What did he tell you was the purpose of that statement?

A. Well, I don't know. I couldn't figure it out. He said he was with the Wage and Hour, so I don't know for sure what it was all about.

Q. Did he tell you the Wage and Hour required a statement from you? A. I think he did, sir.

Q. Is that his language in there that you were reading? A. Yes, sir.

Q. That is what Mr. Faith wrote, is that right?

A. Yes, sir.

Q. Did Mr. Faith attempt to induce you to represent that you were an employee of the Row River Lumber Company, entitled to overtime?

A. That was the impression I got.

Q. Was it your understanding? Was that your understanding, that you were employed?

(Testimony of Mrs. Edith LeCompte.)

A. That I was employed?

Q. Yes. A. I was working for myself.

Mr. Scott: Object to that question and answer.

The Court: It may stand. [139]

Q. (By Mr. Davidson): Did you have to get the consent of the Row River Lumber Company to serve a meal to a person who is not an employee?

A. That was not an employee?

Q. Yes. Do you have to get consent from the Row River Lumber Company for that?

A. No, sir.

Q. You feed whomever you want to?

A. Yes.

Q. And what you want to feed? A. Yes.

Q. And you employ whom you want to?

A. Yes, sir.

Mr. Davidson: That is all.

Redirect Examination

By Mr. Scott:

Q. Counsel asked you if you found the Row River Lumber Company to be reasonable and co-operative in connection with your operation of the cookhouse. A. I think so, sir.

Q. I think you stated you had asked them to go to Portland or at least to get potatoes and other supplies for you from Portland, when you could not buy them down at the camp?

A. That was during the war. You do know there was a war, don't you? [140]

Q. Yes, there was a war.

A. I know meat and everything was hard to get.

(Testimony of Mrs. Edith LeCompte.)

Q. It was difficult to operate the cookhouse during the war, wasn't it?

A. It was quite hard, yes.

Q. It was quite hard? A. Yes.

Q. During the war, when it was difficult to operate the cookhouse and you found you needed some assistance in obtaining your supplies, the Row River Lumber Company was so reasonable and cooperative you felt free to ask them to get supplies for you from Portland?

A. I would hate to think the company would not stand back of me when I asked them to get me two sacks of potatoes.

Q. You would also hate to think they would not fulfill any other reasonable request you would make of them, isn't that true?

A. I think they would be fair with me.

Q. You think they would be fair with you, and you think that they would fulfill any reasonable request you would make in connection with the operation of a cookhouse? A. Reasonable?

Q. Yes. A. I think they would.

Q. When you said you and Mr. Bebe and Mr. Hayes talked over [141] the price of the meal, was the final determination made by Mr. Hayes and Mr. Bebe? A. By Mr. Hayes, I believe.

Q. The final determination was made by Mr. Hayes? A. And I agreed.

Q. And then you agreed? A. Yes.

Q. He asked you if you thought you could make a profit at that price?

(Testimony of Mrs. Edith LeCompte.)

A. I don't know whether he asked me that way or not.

Q. Who is the person that actually set the price, you or Mr. Hayes? A. Both of us.

Q. What did you ask Mr. Hayes or Mr. Bebe? If you could increase the price of meals? Did you feel you had to?

A. I like to be cooperative and they were the company.

Q. They were the company?

A. And the boys were working for the company.

Q. They were the company and the boys were working for the company?

A. And I was boarding the boys.

Q. And you were boarding the boys?

A. Yes.

Q. Mr. Hayes and Mr. Bebe had charge of the mill, is that right? A. As far as I know. [142]

Q. You did not feel you had authority on your own determination to increase the price of meals without asking Mr. Hayes or Mr. Bebe?

A. Never thought anything about it.

Q. You did not think anything about it?

A. No, sir.

Q. You said your husband helped you with the wood, bringing in the wood?

A. He carries in the wood. He don't help me. He carries it in.

Q. He carries in the wood himself?

A. Yes.

Q. And piles the wood up for you?

A. Yes.

(Testimony of Mrs. Edith LeCompte.)

Q. He works for the Row River Lumber Company? A. Yes.

Q. What does he do for the Row River Lumber Company?

A. What difference does that make with you?

Q. He is a regular employee of the Row River Lumber Company? A. Yes.

Q. I hand you Plaintiff's Exhibit No. 7 and I want to ask you a question. I don't think you understood it a little while ago. The amounts you have shown here as being cash payments besides the cash that you receive from boarders, doesn't that include any cash that the employees of the Row River Lumber Company may [143] wish to pay you rather than having a deduction made for meals?

A. Yes, that is in there, too.

Q. In other words, this Exhibit No. 7 would include cash paid you? A. All cash paid in.

Q. All cash paid in by a boarder or an employee of the Row River Lumber Company?

A. Outside boarders.

Q. Or an employee of the Row River Lumber Company?

A. Not an employee of the Row River Lumber Company. There were Youngblood and Martin; that is the only ones; that shows on that statement.

Q. I am talking about Exhibit No. 7. Exhibit No. 7, you say, includes all cash payments made to you?

A. Yes.

Q. Whether these cash payments were made to you by outside boarders or employees of Youngblood and Martin or employees of the Row River Lumber

(Testimony of Mrs. Edith LeCompte.)

Company; if it was a cash payment, it would be included on Exhibit No. 7?

A. Yes, if it was an employee of the Row River Lumber Company; but they didn't, none of them, pay me cash. It goes through the office.

Q. I hand you Plaintiff's Exhibit No. 4 and ask you again as to the statement marked No. 224, whether it shows 1,584 meals paid to you at 40 cents per meal and 1,712 meals paid to you [144] at 15 cents a meal.

A. That is Youngblood & Martin's men again. It does not say "Youngblood & Martin."

Q. Cannot an employee of the Row River Lumber Company pay you in cash?

A. They could, if they want to, yes.

Q. Do they ever do it? A. No, sir.

Q. They never do? A. No, sir.

Q. These meal tickets that you say you mark every time an employee eats in the cookhouse—who furnishes those meal tickets?

A. The Row River Lumber Company.

Q. Do those meal tickets have the name "Row River Lumber Company" written on them?

A. It is printed on them, yes.

Q. When you told Mr. Davidson that you try to have meals that satisfy the people that eat there, you also want Mr. Bebe to be satisfied the way you operate the cookhouse, don't you?

A. Yes, certainly.

Q. I hand you what has been marked Plaintiff's Identification No. 5, which you identified as a state-

(Testimony of Mrs. Edith LeCompte.)

ment signed by you, Edith A. LaCompte, isn't that correct? A. Yes.

Q. Did you read that statement when you signed it? [145] A. Yes, sir, I read it hurriedly.

Q. Last Friday did I not call on you and present this statement to you and let you read it and ask you if it was still your statement?

A. Yes, I believe you did.

Q. And you said it was still your statement, last Friday?

A. I think I did, because I was tired and I didn't care.

Q. Mr. Faith wrote that, is that right, the inspector sitting at my table, Inspector Faith?

A. It looks like the one he wrote.

Q. And he asked you to sign it?

A. Yes, he did.

Q. He didn't tell you you had to sign it?

A. Oh, no. I wasn't forced to sign it. Maybe I signed it to get rid of him.

Q. He didn't tell you that he had a legal right to force you to sign it, did he?

A. I don't think so. He told me he was with the Hour and Wage Law.

Q. Yes, ma'am. He told you he was an inspector with the Wage and Hour Division, United States Department of Labor? A. Yes, that is it.

Q. And you told Mr. Faith, "It is my understanding that the cookhouse and dining room must be operated to the satisfaction of Mr. Hayes and Mr.

(Testimony of Mrs. Edith LeCompte.)

Bebe whom I consider as my bosses," is that [146] right? A. I think that is right.

Q. Is that still your statement?

Mr. Davidson: I am going to object to that. Certainly he is trying to impeach his own witness, if the Court please. I think it is entirely inadmissible.

The Court: Sustained.

Mr. Scott: That is all.

Recross-Examination

By Mr. Davidson:

Q. Do you buy from salesmen who come through at the Row River Lumber Company mill for your cookhouse? A. Yes, partly.

Q. During the war, when things were hard to get, did you ask them to help you in the situation?

A. The salesmen, you mean?

Q. Yes; did they help you?

A. You bet they did.

Q. The same as the Row River Lumber Company helped you? A. Yes.

Q. Mrs. LeCompte, wasn't it your understanding, under the agreement, that the Row River Lumber Company was to furnish everything but the food and the labor? A. Yes.

Q. You said under the agreement the Row River Lumber Company [147] was to furnish everything for the cookhouse, is that right? A. Yes.

Q. Except food and labor?

A. That is right.

Q. So it was in accordance with that agreement that they furnished these meal tickets, is that correct? A. Yes, sir.

Mr. Davidson: That is all. [148]

(Witness excused.)

MRS. IDA GAROUTTE

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scott:

Q. Mrs. Garoutte, did you at one time serve as cook in the cookhouse of the Row River Lumber Company? A. Yes.

Q. Do you know what time it was you served there as cook? A. October, '42.

Q. To when? A. To May 1st of 1945.

Q. Who hired you?

A. Well, I wouldn't say just who hired me. Mr. Hayes and I talked it over and I told him—well, he was looking for a cook in the cookhouse. And I was cooking for Mrs. Thomason, and I told him if he would like to have me there in the cookhouse I would take it over for him, if it was satisfactory to him.

Q. Was there any written agreement between you? A. No.

Q. There was no written agreement?

A. No.

Q. In the agreement you had, that was oral, was there any certain time set that the agreement should run? A. No, sir. [149]

Q. Was any provision made, or was there any mention made at the time the agreement was made as to how your services would be terminated?

A. No, sir.

Q. No certain notice was necessary by the com-

(Testimony of Mrs. Ida Garoutte.)

pany to terminate your services? A. No.

Q. Could you have resigned your services at any time you wanted to?

A. I suppose I could, as I was working for myself. I suppose I could.

Mr. Scott: I would like to strike the last answer as not responsive.

The Court: The answer may stand.

Mr. Scott: Q. What was your duty under the arrangement you had with Row River Lumber Company?

A. I was just to do the cooking for the men employees.

Q. Were you to serve meals to all employees of the Row River Lumber Company who would choose to eat at the cookhouse? A. Yes.

Q. Did you serve any meals to transients?

A. Oh, a few.

Q. About how much per month would you obtain from meals served transients?

A. Oh, I could not tell you just exactly. [150]

Q. What is that?

A. I could not tell you exactly what it would be because maybe some months there would not be any there.

Q. Would it ever be more than \$10?

A. Oh, I don't think so. A month, you mean?

Q. Yes, \$10 a month?

A. No, I don't think so.

Q. I hand you, Mrs. Garoutte, what has been marked as Plaintiff's Exhibit No. 3.

(Testimony of Mrs. Ida Garoutte.)

A. I can't read without taking my glasses off or looking over them.

Q. You do not have to read that first one. I hand you two statements out of Plaintiff's Exhibit No. 3, one with the number 4894 on it, dated March 13, 1945, and another one with the number 4924 on it, dated April 12, 1945.

I will read that for you, since you say you have difficulty reading yourself. The first one with the number 4894 on it shows an entry: "128 meals at 10 cents, \$12.80, bonus on Burrell & Renninger," and then it has this note: "Mrs. Garoutte: We could not collect from Douglas Burrell (\$10) and William Renninger (\$41.20). Will you please collect it from the men down there."

A. They paid me that.

Q. The two men came and paid you the money shown here? A. Yes. [151]

Q. Douglas Burrell paid you \$10 and Renninger paid you \$41.20, but the company paid you a bonus for those meals amounting to \$12.80?

A. Yes.

Q. Statement No. 4924 has this entry: "105 meals at 10 cents, \$10.50, bonus on Renninger", and then the note: "We were unable to collect 105 meals at 40 cents—\$42.00—from William Renninger. Will you please collect it from him down there."

A. The same thing.

Q. Did you collect \$42.00 from Mr. Renninger?

A. Yes.

Q. But, although the company did not make a deduction from Mr. Renninger's wages, they, never-

(Testimony of Mrs. Ida Garoutte.)

theless, paid you the 10-cent bonus for 105 meals, is that correct?

A. That is what it says there, isn't it?

Q. That is what the statement shows. Your answer is yes?

A. It is just as you read it there. It is right there in black and white.

The Court: Adjourn until tomorrow morning at 9:30.

(Thereupon at 5:30 o'clock p.m. an adjournment was taken until 9:30 o'clock a.m. Friday, March 5, 1948.) [152]

Court reconvened at 9:30 o'clock a.m., Friday, March 5, 1948.

Mr. Davidson: It is stipulated by the parties that the original cost in 1942 of labor, lumber and so forth for the construction of the cookhouse was \$1,986.88; that there was an addition in 1946 at a total cost of \$416.95; and there were repairs in 1947 in the amount of \$312.33.

It is further stipulated that the cost of the original equipment of the cookhouse was \$72.93; that there was a further addition of equipment in the year 1946 of \$129.34; and further additions to equipment in the year 1947 of \$887.87, which includes a refrigerator at a cost of \$797.92.

Mr. Scott: I would like to state in the answers to the interrogatories the amount \$312.33 is shown as being expended in 1946, but Mr. Davidson just said it was spent in 1947. I just make that statement to clear up the record.

MRS. IDA GAROUTTE,

having been previously duly sworn, resumed the stand and further testified as follows:

Direct Examination—(Continued)

By Mr. Scott:

Q. Mrs. Garoutte, during the time you were the cook at the cookhouse of the Row River Lumber Company, did the company furnish free to you, without any charge, the cookhouse consisting [153] of the kitchen, dining room and living quarters for you and the kitchen help? A. Yes, sir.

Q. Did the Row River Lumber Company furnish free to you all equipment that was necessary for the operation of the kitchen and the dining room?

A. Yes, sir.

Q. Did the Row River Lumber Company furnish the equipment in your living quarters?

A. No, sir.

Q. Did they furnish any of that equipment?

A. No, sir.

Q. Did you furnish all of that equipment in the living quarters yourself? A. Yes, sir.

Q. When you were originally hired—I think you said you made your oral agreement with Mr. Hayes—was anything said about whether you would be an employee or a contractor with the company?

A. No, sir.

Q. During the time you were the cook at the cookhouse of the Row River Lumber Company do you recall approximately how many hours a week you worked?

Mr. Davidson: We object to that, if the Court

(Testimony of Mrs. Ida Garoutte.)

please. Mrs. Garoutte has been gone since May 1, 1945. She is not there [154] any more, and this testimony is irrelevant.

The Court: Admitted, subject to the objection.

Mr. Scott: Q. Do you recall approximately how many hours you worked?

A. No, I couldn't tell you how many hours I worked.

Q. Did you work over 40 hours a week, would you say?

A. I wouldn't say that I did because I never kept any track of it, and I cannot recall back that long and tell you how many hours I worked or didn't work. I just really couldn't tell you right out.

Q. Can you recall when you started work in the morning to prepare the morning meal?

A. Some mornings it would be earlier than others. Some mornings I would not be there so early. If we did not have many to cook for, I did not have to get up so early. If I had more, I had to get up earlier. We served breakfast at 6:00 o'clock when I started in there.

Q. You served breakfast at 6:00 o'clock?

A. When I started in there, yes. Later on I commenced serving at about 6:30, if I remember right. They had it a half hour later, I think it was.

Q. When breakfast was served at 6:00 o'clock, what time would you have to start work to be able to serve breakfast at that time?

A. Well, depended on what a person was going to serve and how [155] quick it would take to serve it, and if it was for very many it would take—

(Testimony of Mrs. Ida Garoutte.)

Q. You at least began work at 6:00 o'clock at the time breakfast was served, then; would that be true? A. The cook, you mean?

Q. Yes. If you served breakfast at 6:00 o'clock, you would be working by 6:00 o'clock, at least?

A. Yes, certainly.

Q. Do you know how long you continued to work then?

A. Well, if I had a big crew it kept me busy all the forenoon.

Q. Would that be up to 12:00 o'clock that you worked if you had a big crew?

A. Well, around that time.

Q. What time was lunch served, do you recall?

A. At 12:00 o'clock.

Q. Then would you continue at 12:00 o'clock to serve lunch and continue to work after 12:00 serving lunch?

A. Well, I helped with the serving, yes.

Q. How long would you work, serving lunch?

A. Well, I don't know.

Q. What time would you quit?

A. Well, it would be a half hour before they would be through.

Q. You say a half hour before they would be through. You mean the employees would eat lunch from 12:00 to 12:30?

A. About that time. They would go that long before we got the [156] tables cleared up.

Q. How much longer would you have to continue working to get the lunch dishes off the table and the dishes washed or whatever else you did?

(Testimony of Mrs. Ida Garoutte.)

A. I did not do the dishwashing. I put the food away after the meal was over with.

Q. When would you stop putting the food away after the noon meal?

A. That did not usually take me very long to put the food away. I couldn't say just offhand how long it was.

Q. Well, would you work until 1:00 o'clock or 1:30, putting the food away?

A. Well, naturally, when lunch was over and the food was put away, we would eat our lunch during that time, too. It was around 1:00.

Q. About 1:00, is that what you say, when you had finished your lunch?

A. Yes, I would say that.

Q. Well, when would you begin work preparing the evening meal?

A. Well, usually around 4:00, if they had a big crew. If they didn't, you know—

Q. Yes, ma'am. If they had a big crew, it would be about 4:00 o'clock.

A. Yes, if we had a full crew. When I first went in there, we didn't have only one table for a while. I don't remember [157] when we did put in the other table.

Q. Yes, ma'am. How many tables did they have? What was the greatest number of tables they had while you were cook there?

A. Three tables, and they seated eleven at a table, I believe it was.

Q. When you had a large crew and you began

(Testimony of Mrs. Ida Garoutte.)

preparing the evening meal at 4:00 o'clock, when would you finish that evening meal and be through for the day?

A. Well, I always put up the lunches while the girl washed the dishes.

Q. Yes, ma'am. Including the time you spent putting up the lunches, when would you be through for the day? A. Around 8:00 o'clock.

Q. How many days a week would you work those hours? Was the cookhouse open seven days a week?

A. Saturdays and Sundays I hardly ever hired anybody but I did the work myself mostly on Saturdays and Sundays.

Q. How many hours did you work on Saturday and Sunday, the same number you just stated?

A. Oh, no. Oh, no. I wouldn't work that much over the week end. This has been back three years. My memory isn't so good.

Q. Yes, ma'am.

A. It is not as good as it was then. Then I didn't try to remember these things.

Q. How many hours less did you work on Saturday and Sunday [158] than you worked on a week day, do you recall? Was it two or three or four?

A. Some week ends I don't think I worked over six hours a day, and there might be two or three there on a week end.

Q. Would you say you would work at least six hours on Saturday and Sunday on a week end?

A. I imagine I did, because there were other things I had to do, too.

(Testimony of Mrs. Ida Garoutte.)

Q. Yes, ma'am. Do you recall how many hours the waitress worked?

A. No, I never kept track of the hours because I paid by the month, but they never put in the hours that I did.

Q. In addition to the money that you were paid by the Row River Lumber Company, at so much each meal, so much per meal, did you ever receive any extra compensation as overtime for working in excess of 40 hours a week?

A. No, just what I made off the food, buying the food.

Q. Did you keep a record of the hours you worked each day and each week?

A. No, sir, I didn't think I had to.

Q. You never turned a record of those hours in to the Row River Lumber Company?

A. No. No, sir.

Q. Under your oral arrangement with Mr. Hayes, was it provided you would select this help in the kitchen? [159]

A. There was nothing said about that.

Q. There was nothing said about that?

A. No, sir.

Q. Was anything said about whether he should pay the help you had in the kitchen?

A. No, sir.

Q. While you were cook at the Row River Lumber Company, did you ever take a vacation?

A. I took a vacation in the hospital a time or two.

Q. Was that the only time you were ever off

(Testimony of Mrs. Ida Garoutte.)

from your responsibilities of acting as cook, when you were in the hospital?

A. Oh, I was off once and went to the Coast for a couple of days, when there was nobody there to cook for.

Q. During the last month you were cook at the Row River Lumber Company, which I think would be April, 1945, were you sick during that month?

A. Yes, I was in the hospital two weeks.

Q. The rest of the time during that month, when you were not in the hospital, were you acting as cook down there?

A. Yes, I was.

Q. You were cook down there?

A. Yes, sir. I wasn't in the hospital all the month.

Q. While you were in the hospital did you make arrangements for a substitute to cook for you?

A. Yes. [160]

Q. Did you pay the substitute during the time she was cooking?

A. Yes.

Q. Did you have to get the approval of Mr. Hayes or Mr. Bebe for the person you chose as a substitute for you?

A. No, sir.

Q. The cook's duties just passed from you over to your substitute, without any intervention by the company?

A. Yes, sir.

Q. Who was the cook you selected during the time you were in the hospital, do you recall?

A. Mrs. Margaret Cooper.

Q. During the time you were cook for the Row River Lumber Company, did you work in any other position other than cook at the cookhouse?

(Testimony of Mrs. Ida Garoutte.)

A. No, sir.

Q. How long did Margaret Cooper serve as your substitute cook, do you recall?

A. She was cook just while I was in the hospital, the two weeks I was in the hospital, but she helped me out, outside of that, though I can't recall how long she helped me; but I was in the hospital two weeks.

Q. The only money you received from the Row River Lumber Company, then, was the agreed price per meal, is that correct? A. Yes, sir.

Q. When you were cook at the Row River Lumber Company, did you [161] cook regularly and constantly each day and each week?

A. Yes, only the time I was in the hospital.

Q. During the time you were cook at the Row River Lumber Company, you did not cook for any other camps?

A. No, sir. I don't know how I could. One was enough.

Q. During the time you were cook at the Row River Lumber Company, did you hold yourself out to other camps as being in the market for a contract to cook for them. A. No, sir.

Q. When you first went to work as a cook, you did not agree to work for a specific season or a specific year or a specific length of time?

A. No, sir.

Q. When you were cook, you were the only cook there? A. Yes, sir.

Q. How many kitchen helpers did you have at one time?

(Testimony of Mrs. Ida Garoutte.)

A. Only had one at a time.

Q. Would you say, Mrs. Garoutte, that a person with an ordinary knowledge of cooking that one could obtain in the kitchen of a home could serve as a cook in a cookhouse and particularly as a cook in the cookhouse of the Row River Lumber Company? A. Yes.

Q. Your answer is Yes? A. Yes.

Q. Speak loud so the Reporter can hear you.

A. Yes.

Q. You say Yes, that such a person could be a cook at the cookhouse of the Row River Lumber Company? A. Yes, sir.

Q. Did you have any other responsibilities whatsoever while you were cook there, other than purchasing the food and preparing the food?

A. No, sir.

Q. While you were the cook at the cookhouse of the Row River Lumber Company I think you said you got about \$10 or \$15 a month from transients that you would feed.

A. Well, I couldn't say just what it was, but I imagine it would average up to about that.

Q. Other than those transients that you fed, getting that amount of money, were all the other persons that ate at the cookhouse employees of the Row River Lumber Company?

A. Yes, sir.

Q. Did you ever charge an employee of the Row River Lumber Company more than the agreed price per meal? A. No, sir.

(Testimony of Mrs. Ida Garoutte.)

Q. Then the amount you would make in operating the cookhouse would be limited by the agreed price per meal that you could charge the employees?

A. Yes, sir.

Q. While you were the cook of the Row River Lumber Company, [163] was the cookhouse to the general consuming public?

A. No, I wouldn't say that it was.

Q. While you were cook at the Row River Lumber Company, was it part of your work as cook to prepare lunches for the logging employees to take to the woods with them?

A. Was it part of my work?

Q. Yes, ma'am.

A. Yes. That was their meal. I had that to prepare.

Q. Talk louder.

A. It was a meal they had to have in the woods and it had to be prepared.

Q. It was part of your work to prepare it?

A. Yes, certainly.

Q. While you were the cook at the Row River Lumber Company, did the Row River Lumber Company furnish all the light, water and fuel necessary for the operation of the cookhouse?

A. Yes, sir.

Q. During the time you were the cook, do you recall how much you were paid per meal? Wasn't it 50 cents you were paid per meal? A. Yes.

Q. When the original agreement was made between you and Mr. Hayes, did Mr. Hayes tell you

(Testimony of Mrs. Ida Garoutte.)

that would be the amount the company would pay you? A. I don't recall him saying that. [164]

Q. How do you know that was the amount?

A. Well, I cooked for Mrs. Thomason for some men before I took over in the cookhouse, and that is the price that was being paid and that is the price I——

Q. In other words, you knew the company was paying 50 cents a meal? A. Yes.

Q. And that was the amount that you knew that they would pay you? A. Yes.

Mr. Scott: That is all.

Cross-Examination

By Mr. Davidson:

Q. Did you work for Mrs. Thomason from the time she started in August, 1940?

A. No, I didn't cook for her from the time she started.

Q. When did you start there, about?

A. I don't know as I could tell you.

Q. Where did Mrs. Thomason conduct her cookhouse? A. In her own home, her own place.

Q. The company did not own that property?

A. No, sir.

Q. Did you understand while you worked for Mrs. Thomason what arrangement she had with the company for collecting for the meals and so forth?

A. Well, I never inquired into her affairs or anything of the sort.

Q. When you took over the cookhouse from Mrs. Thomason, did you understand that the arrangement

(Testimony of Mrs. Ida Garoutte.)

was just the same, except that the company was going to furnish you a place and equipment?

A. Yes.

Q. Was that the understanding? A. Yes.

Q. Did you understand with Mr. Hayes that whatever you made out of it was to be the difference between your cost of the food and what you would collect for the meals? A. Yes.

Q. Did you understand that your situation was to be the same as Mrs. Thomason's in that regard?

A. Yes.

Q. Did Mr. Hayes, or any other representative of the company, tell you what you had to cook?

A. No, sir.

Q. You planned all your own menus?

A. Yes.

Q. You purchased your own food?

A. Yes, sir.

Q. It is true, then, that the amount you got depended upon the price that you could get for the meals, also depended on the cost of the food and how many people you could serve? [166] A. Yes sir.

Q. Did you have any understanding that you were to get anything different from that?

A. No, sir.

Q. Was there any understanding that you would be paid by the hour? A. No, sir.

Q. Or any minimum rate? A. No, sir.

Q. Have you ever made any claim for overtime compensation?

A. No, sir. I was working for myself.

Q. Did you talk to Mr. Faith about making such a claim? A. Who?

(Testimony of Mrs. Ida Garoutte.)

Q. To Mr. Faith, the examiner here?

A. About making such a claim as that?

Q. Yes. A. No.

Q. Did he talk to you about it? A. No.

Q. Have you made any statement to Mr. Faith, any signed statement?

A. Yes. He asked me questions up there and I answered to the best of my ability, but there was nothing in it like that.

Q. When you had this substitute, did you give the necessary instructions to her as to what to do while you were gone, in [167] the hospital?

A. Well, she knew what to do, to just take over my cooking, that is all.

Q. Did anyone in the company give her any instructions? A. No, sir.

Q. You arranged with her what you should pay her? A. Yes, sir.

Q. Isn't it true that your profit would be more if you were able to buy properly and carefully and store the food properly?

A. Why, certainly, a person naturally would make more.

Mr. Davidson: That is all.

Redirect Examination

By Mr. Scott:

Q. Mrs. Garoutte, you said you had worked in the cookhouse under Mrs. Thomason when Mrs. Thomason was feeding the employees of the Row River Lumber Company. Is that correct?

A. Yes, sir.

Q. Then, when you say that Mr. Bebe did not

(Testimony of Mrs. Ida Garoutte.)

instruct you as to what meals to prepare, and that you prepared your own menus, you knew from experience how to operate the cookhouse?

A. Well, I operated them before that, and I never was turned out or anything.

Q. From your experience in operating cookhouses, you did not need any instructions from Mr. Bebe as to what meals you should serve? [168]

A. I don't think I needed any instructions from him. I never got any, either.

Q. Of course, it is true, Mrs. Garoutte, that when you would buy groceries in large amounts you would buy at a discount. It is true, isn't it?

A. Yes, sir.

Q. It is also true you could charge employees of the Row River Lumber Company only the agreed price of the meal? Is your answer yes?

A. Ask that over again, please.

Q. You could charge the employees of the Row River Lumber Company only the agreed price per meal?

A. I never charged them any more. That is just what they were paying when I took it over, and that is what I got.

Q. It was your understanding that is what you should charge, the agreed price per meal?

A. To tell you the fact, there was nothing said between me and the company about that.

Q. By charging the employees only the agreed price per meal, that would limit the amount of money you could make off of the employees eating at the cookhouse?

(Testimony of Mrs. Ida Garoutte.)

A. The price that I got was all I could figure on making.

Q. Of course, I realize the more employees you have the more money you are going to make.

A. Certainly. [169]

Q. As a total sum?

A. Certainly, yes, sir.

Mr. Scott: I guess that is all.

Mr. Davidson: That is all.

(Witness excused.) [170]

MARGARET COOPER

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scott:

Q. Mrs. Cooper, did you ever serve as cook at the cookhouse of the Row River Lumber Company?

A. Yes.

Q. Would you state during what periods you were the cook?

A. I don't know the exact dates. I know I quit the first day of May.

Q. Were you the cook at the cookhouse during the time Mrs. Garoutte was ill? A. Yes.

Q. Prior to that time, did you serve as cook while Mrs. Garoutte was ill, immediately prior to that time, that is? Immediately prior to that time, had you served as Mrs. Garoutte's helper in the cookhouse? A. Yes, sir.

Q. When Mrs. LeCompte became cook May 1,

(Testimony of Margaret Cooper.)

1945, did you continue as Mrs. LeCompte's helper for a while? A. I stayed for a very few days.

Q. During the time you were cooking, did Mrs. Garoutte pay you? A. Yes.

Q. How much did she pay you, do you recall?

A. Well, for cook or helper?

Q. Cook?

A. I got \$300 for the time I cooked.

Q. How much did you get for your services as a helper? A. \$100 a month.

Q. Did Mrs. Garoutte, to your knowledge, get the approval of Mr. Hayes and Mr. Bebe when you were serving as substitute cook?

A. Not that I know of.

Q. During the time you were cook, did you ever receive any instructions from Mr. Hayes or Mr. Bebe? A. No.

Q. Who helped you with the cookhouse during the time you were cook? A. Mrs. McCormick.

Q. Did you hire Mrs. McCormick?

A. No.

Q. Did you pay Mrs. McCormick? A. No.

Q. Do you know who did hire Mrs. McCormick?

A. That I couldn't say.

Q. Do you know who paid Mrs. McCormick?

A. No.

Q. Did Mr. Hayes or Mr. Bebe ever say to you, while you were cook there, that if you needed any extra help they would see that you got it? [172]

A. Mr. Hayes did, at one time.

Q. Just what did Mr. Hayes say?

A. He just said if I thought I couldn't handle it he would be glad to get somebody to help me.

(Testimony of Margaret Cooper.)

Q. Did you find it necessary to ask Mr. Hayes to get somebody to help you? A. No.

Q. During the few days you stayed on as a helper to Mrs. LeCompte, did Mr. Hayes or Mr. Bebe ever come to the cookhouse and criticize the way Mrs. LeCompte was operating the cookhouse?

A. That I couldn't say. Mr. Bebe and his wife came over one evening while I was there.

Q. Do you know the purpose of their visit?

A. No, I don't.

Q. Did Mr. Bebe talk to Mrs. LeCompte about complaints he had received from men about lunches not being large enough?

A. They were in a different room from where I was, so I don't know what they said. I was doing dishes at the time.

Q. Do you know whether Mr. Bebe was criticizing the way Mrs. LeCompte was running the cookhouse? A. I really couldn't say.

Q. Did you overhear any conversation whatever between Mr. Bebe and Mrs. LeCompte?

A. No, sir.

Q. Did Mrs. LeCompte later tell you what the conversation was [173] between the two?

A. No.

Mr. Scott: That is all.

Cross-Examination

By Mr. Davidson:

Q. Mrs. Cooper, did you understand when Mrs. Garoutte hired you to take her place that you were working for her? A. Yes.

(Testimony of Margaret Cooper.)

Q. Did you understand that she was going to pay you? A. Yes.

Q. And that the profit that you made, if any, while you were there was her profit? A. Yes.

Mr. Davidson: That is all.

(Witness excused.) [174]

FRANCES McCORMICK

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scott:

Q. Did you ever work at the cookhouse of the Row River Lumber Company? A. Yes.

Q. At what time, if you recall?

A. No, I don't. I just remember I helped Ida for a day or two when she was there, and I did go in and help Mrs. Cooper while she was sick.

Q. You helped Mrs. Cooper while Mrs. Garoutte was sick, while Mrs. Cooper was cook there?

A. Yes.

Q. During Mrs. Garoutte's illness?

A. Yes.

Q. Who asked you to help Mrs. Cooper?

A. Well, Mrs. Garoutte actually asked me to help Mrs. Cooper. She told Mr. Hayes she had to give up the cookhouse because she was sick, so he said, "Couldn't you get somebody else in your place?" And she said, "No." "Well," he said, "maybe Mrs. McCormick would do it," and she said, "Well, if she

(Testimony of Frances McCormick.)

would do it, well, then I would be satisfied to keep it until she gets back," so Mr. Hayes told my husband to call me, and I [175] went down and talked to Ida and Mrs. Cooper, and I took it over—Mrs. Cooper was to do the cooking and baking, because I can't bake, and I was to help whenever I could.

Q. Did you talk to Mr. Hayes before you went there?

A. No, I didn't talk to Mr. Hayes at all.

Q. Who paid you during that time?

A. Mr. Hayes.

Q. How much did Mr. Hayes pay you, do you recall?

A. No, I don't; it was somewheres around \$300.

Q. Were you paid in cash or were you paid in check, by check of the Row River Lumber Company?

A. I got a check.

Q. You were paid by check. Was it a check with the name "Row River Lumber Company" printed on it?

A. I couldn't say. It was so many years ago I don't remember.

Q. Do you know if the check was drawn by the Row River Lumber Company?

A. Well, it had Mr. Hayes' signature on. I don't know, but I think it was a Row River Lumber Company check.

Q. The answer is yes, then? A. Yes.

Q. You will have to say yes. Were you paid that \$300 as salary or on an hourly rate?

A. Well, I told him about how many hours I worked, so he gave me a check for it. [176]

(Testimony of Frances McCormick.)

Q. How many hours did you tell him you had worked per week?

A. I didn't count the week—I just estimated for a full month.

Q. You said a full month. Did you work there for a full month or for two weeks?

A. No, Margaret and I were there about a month, because we had to stay until Mrs. LeCompte got up there.

Q. You stayed there a day or two after Mrs. LeCompte was there?

A. No, because Mrs. LeCompte did not come until Ida decided she was not able to come back.

Q. Then you and Mrs. Cooper were in the cook-house during the two weeks Mrs. Garoutte was in the hospital and stayed on about two weeks longer until Mrs. LeCompte could come down there?

A. We were there about a month.

Q. During the time you worked in the cookhouse with Mrs. Cooper, did you work over 40 hours a week?

A. Well, I expect I did. We worked until we got the work done. We had quite a large crew at that time.

Q. You would say you worked how long?

A. Oh, I don't know. I would say about ten or eleven hours a day.

Q. For how many days a week?

A. Well, seven days a week. Wasn't nobody else to do it.

Q. When Mr. Hayes paid you that \$300, did he

(Testimony of Frances McCormick.)

pay you any [177] extra compensation as overtime for work in excess of 40 hours a week?

A. There was no question of overtime because I was working for Mrs. Garoutte.

Q. But Mrs. Garoutte never paid you your money, did she?

A. No, but I took my orders from her just the same.

Q. Do you know whether the Row River Lumber Company paid social security taxes on the \$300 that they paid you?

A. I don't know about the social security. I don't think so. I don't know what they did because I did not have a social security card for a month, so I didn't get paid for about a month.

Q. Did the Row River Lumber Company withhold taxes on that \$300? A. Yes.

Q. Did the Row River Lumber Company pay unemployment insurance on that \$300?

A. I don't know. I didn't check it over at all. All I got was a check and a withholding statement.

Q. Did the company hold up your check until you could get a social security card? A. Yes.

Q. Who told you the company was holding up your check until you could get a social security card?

A. I got a notice from an office here in Portland.

Q. That is, the office of the Row River Lumber Company? A. Yes.

Q. During the time you worked with Mrs. Cooper and at other times when you helped in the cookhouse of the Row River Lumber Company, did you keep

(Testimony of Frances McCormick.)

any record of hours you worked, daily or weekly hours? A. No.

Q. Did you ever send such a record in to the company?

A. I couldn't have, if I didn't keep any. No.

Mr. Scott: Your witness.

Mr. Davidson: That is all.

(Witness excused.) [179]

C. J. SHOBERG

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scott:

Q. Mr. Shoberg, are you employed by the Row River Lumber Company at the present time?

A. Yes.

Q. In what capacity? A. Timekeeper.

Q. In your capacity as timekeeper, do you work in the office of the company at its mill?

A. At the Row River Lumber Company, yes.

Q. In your duties as timekeeper, you do more than just keep the time? A. Yes.

Q. What do your duties consist of?

A. Part of the time I do other things besides that. I do buying and am the purchasing agent; look after the office to see that all of the work is turned in to Portland, to the Portland office and that it gets there on time, in the regular time so they can do their work.

Q. Then you are really manager of the office at the mill? A. You are putting it pretty steep.

(Testimony of C. J. Shoberg.)

Q. How long have you been pursuing these duties in the office [180] at the mill?

A. I believe it was in November, 1941.

Q. During the war, when rationing was in effect, did you ever have occasion to make application to the rationing board for supplemental rations for use in the cookhouse of the Row River Lumber Company?

A. Yes, sir.

Q. In whose name did you make that application?

A. Row River Lumber Company, and I signed it myself.

Q. When you say you signed it yourself, you signed your name?

A. That is right.

Q. You made the application in the name of the Row River Lumber Company?

A. Yes, sir.

Q. Did you talk to Mr. Hayes and Mr. Bebe about making that application?

A. I believe Mr. Bebe and I talked it over. I don't recall the circumstances right now.

Q. The purpose of that application for supplemental rations was to get extra rations for the woods crew of the Row River Lumber Company, is that correct?

A. That is right, sir.

Q. And the supplemental rations were to be used in the cookhouse of the Row River Lumber Company?

A. Yes, sir. [181]

Q. To feed the employees of the Row River Lumber Company, working in the woods?

A. Yes, sir.

Mr. Scott: Your witness.

(Testimony of C. J. Shoberg.)

Cross-Examination

By Mr. Davidson:

Q. Did you handle the transactions between the cookhouse operator and the company?

A. Yes, sir.

Q. Did you handle the deductions made on the payroll for meals for the men? A. Yes, sir.

Q. Do you handle any deductions on the payroll for store bills? A. Yes, sir.

Q. Who operates the store at Row River?

A. I. Humphrey.

Q. Does the company have anything to do with it?

A. No.

Q. Is it on company land? A. No, sir.

Q. Do you have a standing arrangement with the operator of that store that you will honor and deduct on the payroll any charges made by employees? A. Not that I know of, sir. [182]

Q. You do it, though?

A. It was done when I came into the office and has been carried on since.

Q. Is there an operator of bunkhouses where single men stay at Row River?

A. The same man, I. Humphrey.

Q. How many men stay in these bunkhouses?

A. He has room, I imagine, for eight or ten.

Q. Does he collect for those through company payroll deductions? A. Some of them, yes.

Q. Those that he collects for, you withhold from the men? A. That is right, sir.

Q. Are those bunkhouses on company land?

A. No, sir.

(Testimony of C. J. Shoberg.)

Q. Does the company own any part of it?

A. No.

Q. You assisted in this application for rationing. Was it not true that in order to get those additional rations application had to be made by a company employing men doing logging and other heavy work?

A. That is right, sir.

Q. And for that reason you made it?

A. Yes.

Q. Were you requested by the cookhouse operator to make that request? [183]

A. Yes, after I had informed her that it was possible to get them. I think I found out from the rationing board myself.

Q. Was it up to her whether you would ask for them or not, whether she wanted them?

A. I don't recall, sir. I think there was a circular that came around, and it was claimed you could get them if you wished.

Q. You called her attention to that circular, and she decided she would like to take the benefit of it?

A. That is right. We needed them, sir.

Q. Is it your duty to keep a record or at least compile a record of the employees at the mill, as to the hours worked?

A. Yes, sir.

Q. Did you or do you compile any such record as to Mrs. Garoutte, Mrs. LeCompte or their various helpers?

A. No.

Q. Do you consider them employees?

A. No, sir.

Mr. Davidson: That is all.

(Testimony of C. J. Shoberg.)

Redirect Examination

By Mr. Scott:

Q. Mr. Shoberg, you said you made the application for these supplemental rations because you needed them? A. That is what I said.

Q. They were needed in the operation of the cookhouse for these [184] woodsmen?

A. That is right, sir.

Q. And you made the application yourself in the name of the Row River Lumber Company?

A. Pardon?

Q. I say, you made the application yourself in the name of the Row River Lumber Company for these woodsmen employed by the Row River Lumber Company? A. Yes, sir.

Q. And for the benefit of the cook?

A. Yes.

Q. Of course, if the cook had enough ration points without the supplemental rations, it would not have been made?

A. Yes, but you could not ration the meat up at the cookhouse. They just sat down and they wouldn't take the portions of meat they were supposed to during the war but would fill their plates, and the result was they did allow more meat points and sugar points for loggers. In their heavier work, they claimed they needed it.

Q. Maybe you can clear up a point. I hand you Plaintiff's Exhibit No. 4 and ask you if you are familiar with those statements and know what they represent?

(Testimony of C. J. Shoberg.)

A. Yes, I do. They are made out from my statements that I send in.

Q. I show you a statement contained in Exhibit 4 with the [185] number 224 on it, dated 2/12/46, and call your attention to the fact that more meals were paid for at the 15-cent bonus rate than for which the 40-cent deduction was made. I will ask you why there is a larger figure for the bonus payment than for the deduction payment?

A. There probably is a reason but I can't tell you. If I had my original records, I would probably have a reason for writing it that way.

Q. Isn't it the reason that the employees of the Row River Lumber Company can pay this part of the cost of the meals in cash directly to the cook?

A. That could be the reason, but that is not the reason. They don't pay cash.

Mr. Scott: That is all.

(Witness excused.) [186]

JOHN A. LANCASTER

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scott:

Q. Mr. Lancaster, are you employed by the Row River Lumber Company at the present time?

A. I am.

Q. How long have you been employed by the company?

(Testimony of John A. Lancaster.)

A. Since November, about the 15th.

Q. What work do you perform for the company?

A. Set chokers in the woods.

Q. Are you married? A. Yes.

Q. You are? A. Yes.

Q. At the present time do you live in your home or do you live in a bunkhouse?

A. I live in a bunkhouse.

Q. Is that the bunkhouse that is owned and operated by the Row River Lumber Company?

A. It is.

Q. Do you eat all your meals in the cookhouse of the Row River Lumber Company?

A. All except my dinner. [187]

Q. You have your dinner prepared for you by the cook to take in the woods with you?

A. I did until just recently; been putting up my own lunch the last few weeks, two or three weeks.

Q. How much are you charged per week for living in the bunkhouse? A. \$2 a week.

Q. Are those charges deducted from your wages that you have due you from the company?

A. Yes.

Q. Is the cost of the meals that you eat in the cookhouse of the Row River Lumber Company deducted from the wages that you earn?

A. Yes, sir.

Q. Will you be able to work for the Row River Lumber Company if it were not for the cookhouse and the bunkhouse of the company at the mill?

A. No, I don't suppose I would, but I ain't so I would have to work there, because I would not work

(Testimony of John A. Lancaster.)

there if they did not have them. I would go other places and work just as well.

Q. You would not work for the Row River Lumber Company if you could not sleep in the bunkhouse and eat in the cookhouse?

A. I wouldn't say that. There is another bunkhouse you can always sleep in, but no other place to eat.

Q. There is no other place to eat except in the cookhouse? [188]

A. That is right.

Q. Would you have to stay either in the bunkhouse of the company or this other bunkhouse?

A. Yes.

Q. That some other person owns there?

A. Yes.

Q. Who hired you when you first went to work for the Row River Lumber Company?

A. I was working here in Portland at the time, and I wrote down to my brother and asked him to see the boss for me. He was working there at the time and he got the job for me.

Q. Did you know at the time you could get your meals at the cookhouse of the Row River Lumber Company?

A. Yes, sir.

Q. Did you know at the time that you could sleep in the bunkhouse of the Row River Lumber Company?

A. Yes, sir.

Q. Do you know how much you were charged for meals, per meal, that you ate in the bunkhouse of the Row River Lumber Company?

A. Sixty cents a meal, I believe it is.

Q. Do you know whether that is cheaper than

(Testimony of John A. Lancaster.)

you would be able to get a meal in a public restaurant? A. Yes, it is cheaper.

Q. Was the fact that you could get cheaper meals at the cookhouse of the Row River Lumber Company an inducement for you to [189] go up there and work? A. Not especially, no.

Q. But would you say that is one of the attractive features of working there for the Row River Lumber Company, that you can get cheap meals?

A. I wouldn't say. There is nothing very attractive about it, because it is kind of dead up in that country.

Mr. Scott: That is all.

Cross-Examination

By Mr. Davidson:

Q. Mr. Lancaster, you work in the woods, do you?

A. Yes.

Q. You have worked in the woods before in other camps? A. Yes, sir.

Q. What ones?

A. I worked for Nelson Johnson.

Q. Do they run a cookhouse? A. No.

Q. Where else did you work?

A. The Washington Veneer, up here in Washington. It is up above Cougar, the camp is.

Q. Did they have a camp and cookhouse there?

A. Yes.

Q. What did they charge you per meal there?

A. I don't remember exactly what it was. [190]

Q. Do you know whether the price which the Row River cookhouse charges for the employees is

(Testimony of John A. Lancaster.)

more or less or about the same as it would cost to run their own cookhouse?

A. Well, that one is the only other one I ever stayed in, while working in the woods. I don't really know.

Q. You do not have any experience on that?

A. No.

Q. You say you are married? A. Yes.

Q. Do you have any family?

A. One daughter.

Q. Where do your wife and daughter live?

A. Here in Portland.

Q. They could live at the Row River Lumber Company, couldn't they, if you could find a house?

A. Yes, if you could find one.

Q. They would not like it? A. No.

Q. You could live in Cottage Grove?

A. Me and my wife is separated.

Q. You could room and board in Cottage Grove, if you wanted to, couldn't you? A. Yes.

Q. Do you have a car? A. No, sir. [191]

Q. Is there a bus that runs?

A. There is a crummy that runs out there.

Q. What you call a crummy or a company bus runs from Cottage Grove? A. Yes.

Q. The men do come and go in this bus?

A. Yes.

Q. You like the way you are doing better?

A. Yes; don't like to ride on it.

Q. So, it is not essential for a single man to work there to live in the bunkhouse or eat at the cookhouse, is it? A. No, it is not really necessary.

(Testimony of John A. Lancaster.)

Q. You are not required to eat at the cookhouse, if you don't want to? A. No.

Q. You are free to go to Cottage Grove and eat?
A. Yes.

Q. And live where you want to? A. Yes.
Mr. Davidson: That is all.

Redirect Examination

By Mr. Scott:

Q. If you lived in Cottage Grove, where would you get lunches to eat in the woods at noontime?

A. There is a restaurant that puts them up. There are several [192] boarding houses that I have heard spoken of in Cottage Grove.

Q. You told Mr. Davidson it is not necessary for you to eat at the cookhouse at the Row River Lumber Company? A. Yes.

Q. If there are any meals that you do not eat at the cookhouse, are you, nevertheless, charged for those meals?

A. No, sir; but you would be charged if you came in just a few minutes before supper and told them, "I don't want my supper." Then you would be charged because it was already prepared. Otherwise you wouldn't be. If I had my lunch there and told them I did not want my dinner, right after lunch, I would not be charged.

Q. How many employees live in the bunkhouse of the company? A. Six in there now.

Q. Do you know whether they eat their meals at the cookhouse of the company? A. Yes.

Q. Do the other employees who live in this bunkhouse eat all three meals in this cookhouse?

(Testimony of John A. Lancaster.)

A. No, sir; some of them doesn't eat breakfast; they never eat breakfast.

Q. All of these six fellows who live in the bunk-house eat one or more meals per day in the cook-house? A. Yes, sir.

The Court: Do they do that heavy work without eating [193] breakfast?

A. There is one who hardly ever eats breakfast and there is one that eats breakfast about twice a week. Then there is another one that don't eat his breakfast at all.

The Court: And they do that heavy work?

A. The other two work in the mill and I don't know what kind of work they do there.

Mr. Scott: That is all.

Recross-Examination

By Mr. Davidson:

Q. Did you say that you have the cookhouse put up your lunch for you?

A. I did up until recently, yes.

Q. You are putting it up yourself now?

A. Yes.

Q. Where do you get the food with which to put it up? A. At the store.

Q. It is perfectly possible for a person to do that if he wants to, is that right? A. Yes.

Mr. Davidson: That is all.

(Witness excused.) [194]

EDMUND HAYES

was thereupon produced as a witness on behalf of plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scott:

Q. Mr. Hayes, you are the President of the Row River Lumber Company? A. Yes.

Q. How long have you been President?

A. Since its incorporation, I would say, in approximately the early part of 1939—1938 maybe; 1938 or 1939.

Q. Do you recall the date when the Row River Lumber Company remodeled its bunkhouse to be used as a cookhouse?

A. Not the exact date. I would say it was around 1942, some time, in the summer.

Q. Who owned that bunkhouse prior to the time it was remodeled by the company?

A. To the best of my recollection, Frank Bloomer, our logging superintendent, who lived at Beaver Creek, Oregon. When we went down there in 1939, he did not want to move his family down immediately and he asked us if it was all right for him to build a small bunkhouse on the corner of the property. This is on the extreme corner of the property, between Thomason's property and—I believe at that time we told him we could do it and, to the best of my knowledge, he purchased the lumber from the [195] company and built a small one-room, one-garage home and used it for a few months in the year and then gave it up. I cannot recall, but I am sure

(Testimony of Edmund Hayes.)

that the Row River Lumber Company acquired his full equity in the cabin.

Q. They purchased it from him?

A. Yes, sir. I assume so. I could not prove that without going to the books.

Q. What was the occasion or necessity for the Row River Lumber Company remodeling this bunk-house for use as a cookhouse for the company employees?

A. To make adequate facilities for a cookhouse for Mrs. Garoutte, and I think in addition to that question is the circumstances leading up to that, which I will give you, if you want them.

Q. Yes, if you will, please.

A. In 1939 the Row River Lumber Company started its operations at its present site, started logging operations in the woods, and the construction of a mill site.

Very shortly, as I remember, after we went down there, Mrs. Thomason came to us. I remember the lunch we had at their son-in-law's, I believe Mr. Wick. Mr. and Mrs. Thomason were present at that lunch in the summer of 1939 and Mrs. Thomason asked us if we would be interested—he would like to put in a grocery store on the south corner, just off our property on the main road, across from our property. He suggested that if he put this grocery store in we might be [196] willing to collect or allow the bills to be paid on the men's paychecks.

That seemed to be a reasonable thing and we needed some sort of facilities for men to buy groceries there, and I said yes, I thought we would be

(Testimony of Edmund Hayes.)

interested, whereupon, as I remember, Mrs. Thomason said, "Wouldn't you be interested in my running a cookhouse in conjunction with that grocery store?"

We knew that we would not have over eight to ten or twelve men, many times less than that, living there or eating there.

As I remember, we discussed the situation, and she said she would be willing to furnish the meals at a certain price, contingent upon costs at that time, with the arrangement that if costs went up she would have or there would be an opportunity for her discussing that with the company, and the amount to be charged to be deducted on the payroll, as well.

We were interested in such a proposition because in running a very small cookhouse it is difficult to do it under supervision when you are building or constructing a mill—we wanted an independent cookhouse there. We were anxious to encourage private enterprise in the valley. We are always interested in encouraging private enterprises in the Row River valley. We have made frequent contracts with our work because we think that it is a more satisfactory method for any person to do a job. Many people prefer to do a job under the system [197] of private enterprise.

Mr. Thomason constructed this grocery store with the addition of sufficient room for a cookhouse, and we told Mrs. Thomason—she said, "I have no equipment to fit this cookhouse up with." My partner, Mr. Noyes, had recently been operating at Bridal Veil and had equipment, including cooking equip-

(Testimony of Edmund Hayes.)

ment, and plates and spoons and forks and knives, which they didn't need. We thought, in order to make it possible for her to do a better job, for her to make more money, which we wanted her to make, we would supply her with that cookhouse equipment, she to furnish the building.

The arrangement was completed and deductions were made on the payroll, to the best of my knowledge. It was a very satisfactory arrangement, but Mrs. Thomason found it was too much for her physically. She was not a young woman and it was considerably of a job.

Mrs. Garoutte at that time, I believe, was her assistant, at least part of the time, from 1939 to 1942. As I recall it, in 1942 Mrs. Thomason told me once or twice that she was finding it necessary—she did not want to run the cookhouse any more, and, as I recall it, Mrs. Garoutte, who was her assistant, came to me and said, "I would like to take up where Mrs. Thomason left off. I would like to contract all meals, but I have no facilities, I have no house, I have no equipment." [198]

Costs were rising in 1942, if you will recall it; the war was getting on and prices of foodstuffs were rising quite rapidly.

I had never examined the books of Mrs. Thomason, Mrs. Garoutte or Mrs. LeCompte. I asked them occasionally, because I was interested in a satisfactory contract from their side and on our side—I was interested in food, in satisfactory food for our men. That was the only suggestion ever made to any of the contractors in our cookhouse. Fortu-

(Testimony of Edmund Hayes.)

nately, they were all good. They have done a good job. There was no cause for complaint.

Mrs. Garoutte said she had no facilities. We asked her if we remodeled this bunkhouse, which was just next door, practically, to Thomason's store on the main road, the main road from our mill—across the main road from our mill, rather—We asked her if we furnished the building, the facilities, the wood, water and light, if she would be interested in carrying on at the old price which, as I recall it, was around 40 cents, 40 or 50 cents. She said she would be under the same arrangement as with Mrs. Thomason, and we proceeded to remodel the bunkhouse to make it into a small cookhouse which would take care of about eighteen to twenty men, possibly a few more. In addition, there would be a kitchen, living quarters and a place where the men eat.

That was done, I believe, in the summer of 1942 and [199] was carried on by Mrs. Garoutte very successfully until 1945. She did a splendid job. It was during a period of extreme scarcity. The plant was being forced to turn out essential war materials. The cookhouse was run very successfully.

We started with a few men, as I told you, in 1939, and it gradually built up until our maximum crew ate in the cookhouse. At the height of the war, I would say in 1944, there were eighteen to twenty-four men eating there, something of that kind. All terms of the contract were met and were carried out satisfactorily to Mrs. Garoutte, I believe, and to the company, I know.

(Testimony of Edmund Hayes.)

Now, maybe I have gone too far. I have told you about the remodeling of the cookhouse. Mrs. Garoutte handled it until 1945.

Q. Do you recall how much Mrs. Thompson was paid per meal?

A. I think at the latter part it was around 50 cents.

Q. Of that 50 cents was not 40 cents deducted from the employees' wages and 10 cents paid to Mrs. Thomason as a subsidy by the company?

A. That is right. Do you want to know the reason for it?

Q. Yes.

A. The reason for it was this: 40 cents, I believe, was the first price we paid her. She, shortly afterwards, told us that she could not do it for 40, so we felt she should have more. We were interested in paying her—allowing her to be paid a sufficient amount for meals so she could make something, make a reasonable profit on it, because she deserved that. We felt her claim was just and at the time we did not wish to raise the board bill to the men because we wished to have as many men as possible come out from Cottage Grove, which is thirteen miles away. We were competing with mills in Cottage Grove for men and felt if we could furnish a meal for 40 cents or 50 cents it was an inducement for men to come out, so we agreed to assume a 10-cent additional subsidy and let her charge 50 cents, realize 50 cents a meal.

(The Court then proceeded to the transaction of other business.)

(Testimony of Edmund Hayes.)

By Mr. Scott:

Q. Mr. Hayes, I hand you some yellow paper with some writing on it and ask you if that is your signature on Page 3?

A. It appears to be, yes.

Q. Do you recall signing this statement on this date, May 8, 1947?

A. I remember talking with a gentleman concerning it. I don't remember all the details.

Q. On about the date of May 8, 1947, do you recall talking to Inspector Faith who is sitting at this table?

A. I don't remember the date, but I remember talking with the Inspector.

Q. Do you remember that, after you finished your conversation, [201] Mr. Faith wrote out this statement and gave it to you and asked you to sign it, if you wanted to?

A. I assume I did because I would not have signed it if I didn't.

Q. Do you recall that before you signed the statement you said you wanted your attorney, Mr. Davidson, to read the statement, first?

A. I presume I did.

Q. I would like to have you read those two paragraphs right here in this statement to the Reporter, please.

A. "Our agreement was that Mrs. Garoutte was to furnish the company each month with a list of the meals furnished each employee for the period. The company agreed to deduct 40 cents for each

(Testimony of Edmund Hayes.)

meal from the men's pay and pay 10 cents per each meal from company funds.

“Our reason for paying 10 cents per meal from the company funds was that the mill is located at quite considerable distance from a town and labor is difficult to secure and keep. Holding down the cost of meals to the men was an inducement for them to remain in our employ.”

That is the statement I made.

Q. And that is still your explanation of this?

A. That is the explanation, the one made at that time, yes, to the best of my memory.

Q. Would you say that is still the explanation of the reason [202] for the subsidy paid for meals?

A. Not entirely. Conditions have changed since then.

Q. At the time you made this statement, this statement represented the true reason for the payment of subsidy for the meals?

A. I would think so.

Q. To what extent has what you have said there changed since you made this statement?

A. Have you been in touch with the labor situation in the lumber industry?

Q. No, sir.

A. Then you are not acquainted with labor contracts, involving the amount for meals which the men pay in surrounding communities.

Q. No, I don't know anything about the logging industry.

A. Well, I think there are other considerations today in connection with such a thing, but, gener-

(Testimony of Edmund Hayes.)

ally speaking, I think the original arrangement for the company to absorb some of the subsidy or some of the increase in costs of board, some of the periodic increases, was largely with that in mind, and also the fact that the company has been involved in numerous labor negotiations and, as a result, from all the reasons that we have—and there are many others, too—we have been inclined to hold down the cost of meals as much as possible in that community down there rather than to have them come up. We feel it is an advantage to our employees. [203]

Q. Did you make the agreement with Mrs. Garoutte to do the cooking at the cookhouse?

A. As I recall it, yes.

Q. That agreement was completely oral, was it not?

A. Yes.

Q. It had no definite term for which it was to run?

A. That is right. It was satisfactory to both parties.

Q. The company could have dismissed Mrs. Garoutte at any time under the arrangement?

A. No.

Q. Would you explain that “No”?

A. That would violate all the policies we have ever had in connection with the operation of the company.

Q. In other words, it is the policy of the company, when a person’s services are terminated, to give reasonable notice, is that correct?

A. Yes, until they can make an arrangement satisfactory to themselves and also they, in turn,

(Testimony of Edmund Hayes.)

can make an arrangement to give us notice satisfactory to us.

Q. Does that policy apply to employees of the company that work in the mill and in the woods, too?

A. Naturally, and it also, if I might add, applies in subcontracts. The Willamette Valley is a great place for verbal contracts, and I think this probably has worked out more successfully than any written contract the company has ever [204] had. It has run since 1939, to 1948, and I know of no disagreement under this contract. I know of no understanding on either side which has not been fulfilled, and that is a pretty good record.

Q. When the company first built the mill and the planing mill there, was it decided at that time that there should be a cookhouse run in conjunction with the mill?

A. No. At what time are you referring to?

Q. When you constructed the mills, did you also plan a cookhouse to be operated in conjunction with the mill?

A. No, we have never planned to operate our own cookhouse, and this was borne out by the arrangement we were immediately offered when *we* down there by by Mrs. Thomason, which was entirely satisfactory to us.

At the time you first began talking with Mrs. Thomason, the company was in the market for someone to operate a cookhouse for the company employees, is that correct? A. No, sir.

Q. What was your purpose of entering into this

(Testimony of Edmund Hayes.)

arrangement with Mrs. Thomason to operate this cookhouse if the company did not want a cookhouse for the feeding of its employees?

A. Your question asked me whether at that time we had planned for a cookhouse, is that correct?

Q. I asked you whether, at the time you constructed the mill, you also planned a cookhouse?

A. No, sir, we did not have sufficient men to establish such a cookhouse. It was a convenience for those of us who ate there but not a necessity.

Q. After the mill was completed and it was producing lumber, then did it become necessary or convenient that a cookhouse be operated for the employees?

A. Convenient, but not a necessity.

Q. And at that time did the company desire that some arrangement be made to have the cookhouse operated for the employees?

A. As a convenience, not a necessity.

Q. When Mrs. Thomason first thought about building this cookhouse, didn't she want it built in a different location from which it was later constructed? Didn't she want to construct a cookhouse about 200 yards down the road, and you said you would like to have it constructed at the present site because it would be more convenient for the employees to eat at the site which you selected?

A. I don't remember. I have no recollection of that.

Q. Didn't you tell Mrs. Thomason you preferred it to be located directly across the road

(Testimony of Edmund Hayes.)

from the mill as it would be more convenient for the men to come from work?

A. I don't recall that. I don't see how that could have been done because Mr. Thomason had selected a site, I believe, when we went down there, so they were restricted, almost restricted as to the place to build. [206]

Q. Before Mr. Thomason did select the site, did he have any other site in mind?

A. I don't recall.

Q. Mr. Hayes, do you recall the time when Mrs. Garoutte became ill and had to go to the hospital? Do you recall that time?

A. Approximately, yes.

Q. Do you recall that during the time she was in the hospital and also after she resigned and Mrs. LeCompte was retained as cook, that for about two weeks before Mrs. LeCompte could take over the cookhouse Mrs. Margaret Cooper was the cook? Do you recall that?

A. I recall there was a period in between in which I thought that Mrs. McCormick was in there at that time. I don't recall how it was handled.

Q. During that period that Mrs. McCormick was working with Mrs. Cooper, did you hire Mrs. McCormick?

A. I don't recall. I don't know whether Mrs. Garoutte or somebody else made the arrangement with her. I think Mrs. McCormick was down there before I was aware of it. It might have been before. I don't recall it at the present time.

Q. Do you recall talking to Mrs. McCormick at

(Testimony of Edmund Hayes.)

all concerning her working there during that period?

A. Yes, I do. I remember having some conversation with her in which we made some arrangement on a temporary basis to take [207] care of the situation, to run the cookhouse.

Q. What were those arrangements, do you recall?

A. As I remember, we asked her for the number of hours that she had coming eventually—As a matter of fact, I don't think she cared to do it at all, but she was willing to do it to help Mrs. Garoutte and to help the company. She came in voluntarily to pinch-hit until we made arrangements with somebody else to take on the contract for running the cookhouse. As I remember, I asked her for the hours that she had worked, and we agreed on a per-hour basis and she was paid on that basis.

Q. Did you ask Mrs. McCormick to work at the cookhouse to help out the company during that period?

A. I assume so, to keep the cookhouse going it indirectly would help the company, yes.

Q. Do you recall asking Mrs. McCormick?

A. No, I don't. I don't remember any such remark as that. This contract with Mrs. Garoutte—They were with the company; there is no question about that. The company would not have made it if it was not.

Q. Did the company pay Mrs. McCormick during the time that she was there?

(Testimony of Edmund Hayes.)

A. I think it did.

Q. Did you make the arrangement with Mrs. McCormick to pay her on behalf of the company?

A. I believe I did. It was either through her husband, Mr. McCormick, who was working for the company, or—I think we made it directly with Mrs. McCormick.

Q. Did you make the arrangement to pay Mrs. Cooper during that period?

A. I don't recall that.

Q. Did you select Mrs. Cooper to be the cook during that period? A. No.

Q. But you did pay Mrs. McCormick for her work during that period?

A. I paid her, as I recall it, for the supervisory work that was necessary between Mrs. Garoutte and the acquisition of another contractor to run the cookhouse. We naturally had to pay her for her services during that period.

Q. Why did the company pay Mrs. McCormick for her services rather than Mrs. Garoutte?

A. I presume at that time Mrs. Garoutte would be considered as giving up the contract. She was incapacitated and was in the hospital. Steps had to be taken to replace her as a contractor.

Q. How could you say Mrs. Garoutte should give up the contract if Mrs. Cooper was selected by Mrs. Garoutte to continue as cook while she was in the hospital?

A. I think Mrs. Cooper was trying to carry on with [209] Mrs. Garoutte's contract to the best of her ability. I assume that was the case.

(Testimony of Edmund Hayes.)

Q. Mrs. Cooper did not have a contract with the company to cook, did she?

A. I don't think so. I would not consider it so.

Q. Wouldn't you say then at the time Mrs. Cooper was cooking, while Mrs. Garoutte was in the hospital, that she was substituting for Mrs. Garoutte under Mrs. Garoutte's contract?

A. Mrs. Cooper was substituting?

Q. Yes, for Mrs. Garoutte, under Mrs. Garoutte's contract, while Mrs. Garoutte was in the hospital?

A. That is an assumption which I would not want to pass on right now. It was the situation of a breakdown in the cookhouse; because Mrs. Garoutte was laid up in the hospital, we had to do whatever we could do so the men could eat there.

Q. It was necessary to keep that cookhouse running during the time she was in the hospital, is that right?

A. It was a very convenient thing, yes. It was to the advantage of the company, just as our original contract was.

Q. Mrs. McCormick said she was paid \$300 by the company for her services during that time. Is the paying out of \$300 of the company's money merely a convenience? A. A convenience?

Q. Yes.

A. Well, it is a convenience, yes, in order to keep the [210] cookhouse going.

Q. What I mean is this: Are you paying out \$300 of the stockholders' money merely as a con-

(Testimony of Edmund Hayes.)

venience or as a necessity in the operation of the company?

A. Sometimes a convenience and sometimes a necessity. The stockholders never do things entirely—don't want the officers of the company to do it from necessity always. We do it for many reasons.

Q. The point is: It is a benefit to the operation of the company that this money was spent in this way?

A. That is right.

Q. If it were not a benefit to the company in the operation of its business, you would not spend the money?

A. That is right.

Q. During the time Mrs. McCormick was at the cookhouse and was paid, did the company keep a record of the hours she worked each day and each week?

A. As I remember, I asked Mrs. McCormick to keep her time and she turned in the approximate time that she had spent there.

Q. Was she paid on the basis of the time she turned in?

A. I assume she was, yes.

Q. Was she paid an hourly rate for that time?

A. I think it was figured up on an hourly basis, the time she spent. [211]

Q. And you told her what her hourly rate would be when she began working there?

A. I think Mrs. McCormick was there before I realized she was there, because she came down to fill in, and the arrangement I think was made subsequent to the time she arrived, subsequent to the time she was working.

(Testimony of Edmund Hayes.)

Q. But you told her how much she would be paid an hour for her services?

A. I assume I did, yes.

Q. During this time, if it was not the responsibility of the company, why did you feel it was up to you to arrange to have help for Mrs. Cooper, if Mrs. Cooper was merely substituting for Mrs. Garoutte?

A. They had had two operating the cookhouse up to that time. I assume they needed two from then on to run it. That was the conclusion, I imagine, we came to at the time. It was in the middle of the war or, anyway, it was when there was a great demand for men and, naturally, when you have a cookhouse established in a community the men use it, and there were many transient men coming and going.

Q. Isn't it a fact when Mrs. Garoutte went to the hospital it looked like the cookhouse was going to close down unless the company did something to keep it open, and that something would have to be done by the company to see that sufficient personnel was in the cookhouse to operate it, and you took it [212] upon yourself to see that that situation was remedied?

A. I think Mrs. McCormick went down there before I ever had anything to do with it. She went down in order to keep the cookhouse going. Whether she went down to help Mrs. Garoutte out, I don't know, but we made the arrangement when she was there. Naturally, she did not want to stay there, and we had to recompense her. Mrs. Garoutte was

(Testimony of Edmund Hayes.)

gone and we more or less had to carry on because it was then an established institution.

Q. You realized that Mrs. McCormick would not remain there unless she was paid something for her services? A. Naturally.

Q. You also realized it was up to the company to pay her for her services?

A. I assume so, because Mrs. Garoutte had been ill and had not probably been able to leave the situation in tip-top shape and, as a result, we stepped in and helped out to that extent.

Q. Wouldn't you say it has been the policy of the company, in connection with its cookhouse, that, whenever it becomes necessary that the company step in and help out, the company has been glad to do so?

A. Naturally. We are always glad to cooperate with any contractor. It is mutually advantageous. We have always been glad to cooperate with the cooks because we wished them to make a success and we were aware that it was a convenience to the company to have it. [213]

Q. Do you recall whether or not the Row River Lumber Company paid social security taxes on the amount of money paid Mrs. McCormick?

A. I would assume we did, but I would want to verify that by the record.

Q. Do you know whether or not withholding taxes were paid by the company on the money that she received?

A. I assume that would be the case.

Q. And old age benefits and unemployment

(Testimony of Edmund Hayes.)

taxes? A. I assume so.

Q. Do you recall that application was made by the Row River Lumber Company for supplemental rations at the cookhouse during the war?

A. Yes, sir.

Q. Did you ever talk to Mr. Shoberg about making application for those rations?

A. Yes.

Q. What did you tell Mr. Shoberg, do you recall? A. I don't recall.

Q. Did you tell him to do everything necessary to get supplemental rations needed by the cook?

A. I assume I would, under those conditions.

Q. Who are Youngblood & Martin?

A. They are contractors, falling and bucking contractors. They fall and buck the timber before it is yarded in the woods. [214] We have had a contract with them—We did have a contract with them but not now. They are both gone, but in the record you referred to Youngblood & Martin. Those are falling and bucking contractors.

Q. When the contract was made with Youngblood & Martin to perform this work for the company, were they told that their employees could eat at the company's cookhouse?

A. I couldn't tell you. The arrangement in our operation is this: The Vice-President of the Company, Mr. Noyes, would take care of all woods operations and I take care of all operations at the mill. I only am aware that we have such a contract but I couldn't tell you what arrangement was made as to where they ate.

(Testimony of Edmund Hayes.)

Q. Do you know that the employees of Youngblood & Martin do eat at the cookhouse?

A. I think most of them eat there. I wouldn't be sure, because I know very few of their men; not acquainted with them personally. I know some of them, because some have been in our employ before they worked for them.

Q. I will show you Plaintiff's Exhibit No. 4 and call your attention to the Statement No. 224, dated February 12, 1946—No, Statement No. 834, dated August 11, 1947, which has the entry "17 meals at 50 cents (Youngblood & Martin), \$8.50." I will ask you if you can tell me what that represents?

A. No, I couldn't. I am not sufficiently conversant. I assume [215] it applies to men for whom deduction was made.

Q. That is, employees of Youngblood & Martin who ate at the cookhouse? A. I assume.

Q. You would assume that?

A. I would assume that. That is correct.

Q. In other similar entries on Plaintiff's Exhibit No. 4, would you assume that to be the same situation? A. I have not seen them.

Q. I beg your pardon?

A. I have not seen these other entries you are talking about.

Q. For instance, then, statement numbered 812, dated July 11, 1947, there appears the entry "95 meals at 50 cents (Youngblood & Martin) \$47.50."

A. I assume that would be the same thing. Do you want an explanation of that?

(Testimony of Edmund Hayes.)

Q. Yes.

A. They operate a good many miles from the mill. I assume with the office at the mill, Youngblood & Martin found it a convenience to turn in their accounts to the office and make deductions at the office for these meals.

Q. Do you know whether the question was asked beforehand whether the cook wanted to serve the employees of Youngblood & Martin?

A. I couldn't tell you. [216]

Q. Mr. Hayes, the Row River Lumber Company spent a considerable bit of money on the remodeling of this cookhouse and equipping of the cookhouse and repairs to the cookhouse since it was opened in 1942.

A. The record which I brought in here yesterday I think showed some \$2100.

Mr. Davidson: \$2700, we stipulated this morning or, rather, \$3700.

Q. (By Mr. Scott): About \$3700 has been spent by the Row River Lumber Company on this cookhouse. Would you say that the Row River Lumber Company spent that amount of money, stockholders' money, unless this cookhouse be considered an appropriate function in the operation of the mill?

A. What do you mean by "appropriate function?"

Q. That the management of the company considered that the operation of this cookhouse was to cost about \$3700, that that is a justifiable expense for the operation of this mill of the company?

(Testimony of Edmund Hayes.)

A. I think it is a justifiable expense. I would also add \$3700 is not any great sum today in any investment in a cookhouse.

Q. It is quite a bit of the stockholders' money, though, isn't it?

A. I would not think so, in considering building costs today, no. [217]

Q. Would the company continue to pay several hundred dollars a month—I think it amounts to two or three hundred dollars a month—in its subsidy that they pay for these meals—Would the company continue to pay that amount of money in the operation of this cookhouse if it was not rather essential to the operation of this mill?

A. I wouldn't say that it was absolutely essential. In fact, when we were down there, you asked the question in which you said, "Did the company plan when we went down there to establish a cookhouse?" I would say No, because there are so many people in the Willamette Valley, ranchers and so forth, living around there who want employment, and still live at home. We are very glad to let them live at home. It is a convenience, yes, and it is a convenience that I don't know whether we can afford to continue or not. As a matter of fact, I think there is very serious consideration at the present time, with the number of men who are eating there, as to whether we can afford to have a contractor working there and continuing that.

We will have to substitute men who live in the vicinity for those who are leaving there, and we will probably have to do that. It would be an un-

(Testimony of Edmund Hayes.)

fortunate thing for men who live there at the mill and eat at the cookhouse, but nevertheless they can be replaced from the community.

Q. That is just your assumption, that they can be?

A. That is my assumption, yes, it is my opinion.

Q. You have never made any survey to see whether or not you could substitute the employees who eat at the cookhouse with ones who could eat in private homes around the area? You have never made any such survey?

A. You don't need to make more of a survey. They come down in the morning at breakfast and have dinner at home at night. When you only have five or six men eating there, that would not be a very great demand to make, that they either find places to live around there or we will have to replace them with men who can.

Q. Just a little time in the past as many as thirty people ate in the cookhouse?

A. That is right. It was that much more of a convenience.

Q. But during the war years, about thirty people ate in the cookhouse, is that correct?

A. Oh, I doubt if it would average thirty; between twenty and thirty, yes.

Q. The purpose of having this cookhouse and spending this company money on the operation of the cookhouse is that it is to feed the employees of the Row River Lumber Company?

A. The purpose of spending \$3700, you mean, and the subsidy?

(Testimony of Edmund Hayes.)

Q. Yes. The purpose is to provide a place for the employees of the Row River Lumber Company to obtain meals?

A. I think that is a fair statement, yes; the reason we went into the contract originally. [219]

Q. If the cookhouse were operated in a manner which was not satisfactory to you, would you feel that conditions would have to be changed and a new cook would have to be obtained?

A. Not necessarily.

Q. What would you do in that situation?

A. Just what anybody else would do if he had a contract with anybody and they were not satisfactory in performing it—go to them and discuss the situation.

Q. You would discuss the situation with them?

A. Yes.

Q. If that would not remedy the situation, in connection with the arrangement you have with the cook, you can dismiss her?

A. I could not.

Q. The company can dismiss her?

A. No, the company could not as long as I am an officer of it. That would be violating one of their greatest policies, being fair with whomever they are dealing with, and I think that would be vouched for by the employees who are here, if you wish to call them.

Q. I am not talking about what the company and plant policy is. I am saying: Under the arrangement they can be dismissed at will by the company?

A. Our policy—

Q. I am not talking about policy. I am talking

(Testimony of Edmund Hayes.)

about what you can do under this contract, if you so choose? [220]

A. No, I would say the essence of this contract is not that; the substance of this contract is not that. I don't think any of these contractors we have had up here would say that. I do not think any of them would expect to be discharged on momentary notice. It is what is behind the contract.

Q. The contract has no definite term to run, has it? A. No, sir.

Q. The contract is not for a particular season or a particular year? A. No.

Q. Nor for a particular number of months?

A. No, sir, but they have held that contract, if you will go back in the record and see, for a considerable period, and they have all left because of their wish, their desire to terminate it, and they have never terminated on immediate notice. There has been a period of a lapse of thirty to sixty days, in Mrs. Garoutte's case and Mrs. Thomason's case.

Q. Let me state the question again. The contract has no definite term to run. Couldn't you discharge a contractor if you so chose without any notice whatsoever, if they operated the cookhouse in a manner that did not meet with your approval?

A. The spirit of the contract is to give these people time, and there is no other guiding force that would bind me to discharge them or that would force me to discharge them in that manner. [221]

Q. The only permanency of the relation of the cook to the company is that, so long as it is mutually satisfactory, the arrangement will continue?

(Testimony of Edmund Hayes.)

A. That is right.

Mr. Scott: Your witness.

Cross-Examination

By Mr. Davidson:

Q. Will you describe about the size of the cook-house, the building we are talking about here, the external dimensions?

A. Well, the part where the men are served meals is approximately 30 or 35 feet long by 12 feet wide, 12 or 14.

Q. 30 or 35 by 12? A. Yes.

Q. What type of construction?

A. It is extremely light construction.

Q. Lumber?

A. Lumber; shingle roof.

Q. You have spent \$3700 over a period of eight years or about \$450 a year, or maybe \$35 a month, for 150 employees. Do you consider that extravagance? Do you consider that extravagant for a convenience? A. I wouldn't consider it so.

Q. How were prices set that were to be charged for meals by the cookhouse contractors?

A. By mutual agreement between the contractor and, usually, [222] myself.

Q. Did you at any time say to any one of the cooks, without any consultation, "Prices from now on will be thus and so"? A. No, sir.

Q. Has the price agreed upon, as to each of these, been satisfactory with the contractor?

A. I assume it has. It is as satisfactory as any agreed price can be and we know—We have been through very difficult times in operating restau-

(Testimony of Edmund Hayes.)

rants, as anybody in the business will testify, I think, today with rising costs of food and difficulty of obtaining food. The only assumption I can make is that this contract has been reasonably satisfactory, because the contractors have all stayed with it. In both the case of Mrs. Thomason and Mrs. Garoutte I think it was physical disability that made them give it up.

Q. Have you at any time given any orders to any of the contractors as to what food they shall serve? A. No.

Q. Has anyone done that under your direction?

A. Not to my knowledge.

Q. You would know if you have directed them to do so? A. Yes.

Q. Have you ever ordered or instructed or had anyone else instruct any of these cookhouse contractors as to whom they should employ? [223]

A. No.

Q. Whom they should employ to help them?

A. No, sir.

Q. Or from whom they should buy goods or supplies? A. No.

Q. There has been evidence here that the company gave some assistance in obtaining some shortening and some potatoes for the cookhouse?

A. That is right.

Q. Will you explain that situation, why that was done?

A. At that time there was an extreme shortage of food, especially in outlying districts. As I recall it, Mrs. LeCompte reported the difficulty she

(Testimony of Edmund Hayes.)

was having to Mr. Shoberg who naturally cooperrated with Mrs. LeCompte in obtaining the food, the way anybody naturally would; you would help out the best you could to keep the wheels going, and our company was only doing that, and they were paid—I am sure they were paid by the contractor; the company was paid for things that it obtained or purchased for them. It was natural to assume the contractor would come to us because we had a Portland office.

The Court: Recess until one-thirty.

(Thereupon a recess was taken until 1:30 p.m.) [224]

(Court reconvened at 1:30 o'clock p.m. Friday, March 5, 1948.)

EDMUND HAYES

thereupon resumed the stand as a witness in behalf of plaintiff and further testified as follows:

Cross-Examination (Continued)

By Mr. Davidson:

Q. Have you at any time during the existence of any of these contracts with Mrs. Thomason, Mrs. Garoutte and Mrs. LeCompte, inspected the cook-house to determine whether it was maintained in a satisfactory manner?

A. Only casually when I went there to eat.

Q. You gained an impression at that time?

A. That is all, just an impression.

Q. Did you ever give any orders to any of the

(Testimony of Edmund Hayes.)

contractors as to the maintenance or manner of maintenance? A. No, sir.

Q. Is Row River what is known as a company town?

A. No, there is no town there, as such. There are houses there which we built, largely,—about fifteen or eighteen houses which were built by local men and rented largely to Row River Lumber Company employees.

Q. Does the company own some houses there?

A. They only own six houses which we built during the shortage—during the war. [225]

Q. By whom are those houses occupied?

A. Largely by key men. We have two back of the sawmill; we have eight company houses.

Q. Eight houses altogether? A. Yes.

Q. Do you undertake to furnish housing for anyone who comes there to work?

A. No. We have had a policy of—We sell employees lumber at cost and encourage construction of their own houses, and many have done that, up and down the Valley. We sell them a bill of lumber for it at our wholesale price, not the retail.

Q. What were your total sales of lumber and wood products by the Row River Lumber Company in the year 1947?

A. About a million and a half.

Q. Is the investment of some \$3700 in the cook-house and equipment significant in relation to that total investment, to your total investment there?

(Testimony of Edmund Hayes.)

A. I would not consider it so.

Q. Did you at any time say to Mrs. Thomason or Mrs. Garoutte or Mrs. LeCompte, at the time of making arrangements with any of them, or thereafter, that they were employees of the Row River Lumber Company? A. No, sir.

Q. Did you consider them to be employees?

A. Never. [226]

Q. You have cooperated with the local store there in collecting store bills through the payroll, haven't you? A. That is right.

Q. Do you make any charge to the man who runs the store for that service?

A. No. We allow the store to sell and to make deductions on the payroll, and we have no connection with the store whatever. We feel it is a service to the men and help maintain that store.

Q. You also make payroll deductions in connection with charges for bunkhouses owned by persons other than the company?

A. That is right.

Q. Do you make a charge against the owner of the bunkhouse for that service? A. No.

Q. That is just an accommodation and cooperation? A. Yes.

Mr. Davidson: That is all.

Mr. Scott: I have no further questions.

(Witness excused.) [227]

MRS. EDITH LeCOMPTE,

having been previously duly sworn, was recalled as a witness on behalf of plaintiff and further testified as follows:

Direct Examination

By Mr. Scott:

Q. I would like to clear up a point that may be confusing in the record. I hand you Plaintiff's Exhibit No. 4 and refer again to the statement with the number 224 on it, dated 2/12/46.

I call your attention to the fact that 1,584 meals were paid to you at a price of 40 cents, whereas 1,712 meals were paid to you at a 15-cent bonus. I will ask you to state why more meals were paid to you at the bonus than when a payroll deduction was made?

A. The extra meals is the boys that worked for Youngblood & Martin and they paid me the cash, 40 cents a meal, what the employees are supposed to pay, and the company paid the 15-cent bonus on those meals, the same as the other meals.

Q. I will ask you to look at the statement with the number 812 on it, which contains an item of 94 meals or 95 meals, rather, at 50 cents, Youngblood & Martin, and ask you if there was any difference in the way meals for Youngblood & Martin were paid for during the time they ate at the cook-house?

A. No, sir.

Q. You stated before that the employees of Youngblood & Martin paid you directly in cash the amount that they were charged [228] for their meals?

A. Yes, sir.

(Testimony of Mrs. Edith LeCompte.)

Q. Here it shows that the company made a deduction of 50 cents per meal from the payroll for Youngblood & Martin employees and paid that to you as a payroll deduction? A. That is right.

Q. For a while the employees of Youngblood & Martin paid you directly in cash? The employees of Youngblood & Martin paid you their part of the meals in cash and the company paid you a subsidy on those meals? A. Yes.

Q. Then, at another period, all the amount for meals for Youngblood & Martin employees was paid to you by payroll deduction? A. Yes.

Q. And they did not pay you in cash themselves, then?

A. It was held out of their wages, the same as the Row River Lumber Company employees.

Q. On Plaintiff's Exhibit No. 7, which is the statement by you as to your cash income during the year 1945, the year 1946 and the year 1947: That cash would include cash payments paid to you directly by Youngblood & Martin employees?

A. Yes. Some of it is on the statement and some here.

Q. Yes, ma'am.

A. Yes, that is correct. [229]

Mr. Scott: That is all.

Mr. Davidson: No questions.

(Witness excused.)

Mr. Scott: That finishes the plaintiff's case, your Honor.

Mr. Davidson: The defense has no further evidence to offer, your Honor.

(Testimony closed.)

(Oral argument of counsel.) [230]

REPORTER'S CERTIFICATE.

I, Ira G. Holcomb, a Court Reporter of the above-entitled Court, duly appointed and qualified, do hereby certify that on the 4th and 5th days of March, A.D. 1948, I reported in shorthand certain proceedings had in the above-entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages numbered 1 to 230, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said dates as aforesaid, and of the whole thereof.

Dated this 22nd day of March, A.D. 1948.

/s/ IRA G. HOLCOMB,
Court Reporter.

[Endorsed]: Filed March 23, 1948.

[Endorsed]: No. 12154. United States Court of Appeals for the Ninth Circuit. William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, Appellant, vs. Row River Lumber Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed January 14, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12,154

WILLIAM R. McCOMB, Administrator of the
Wage and Hour Division, United States De-
partment of Labor,

Appellant,

vs.

ROW RIVER LUMBER COMPANY, a Corpora-
tion,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON BY APPELLANT

Appellant William R. McComb, pursuant to Rule 19(6) of the rules of this Court, states that the points on which he intends to rely on appeal are

those points set forth in the "Statement of Points" filed on January 6, 1949, in the United States District Court for the District of Oregon.

Dated: January 24, 1949.

/s/ WILLIAM S. TYSON,
Solicitor.

/s/ BESSIE MARGOLIN,
Assistant Solicitor.

/s/ KENNETH C. ROBERTSON,
Regional Attorney.

/s/ JAMES F. SCOTT,
Senior Attorney, United States Department of Labor,
Attorneys for Appellant.

(Duly verified.)

[Endorsed]: Filed January 24, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS
OF RECORD NECESSARY FOR CONSID-
ERATION BY THIS COURT

Appellant William R. McComb, pursuant to Rule 19(6) of the Rules of this Court, states that the record necessary for consideration on appeal is the entire record on appeal, as certified and transmitted by the Clerk of the District Court to the Clerk of this Court.

Appellant respectfully recommends that the fol-

lowing designated exhibits be considered by the Court in their original form, and that the Court dispense with their reproduction in the printed transcript of the record:

1. Plaintiff-Appellant's Exhibit 3.
2. Plaintiff-Appellant's Exhibit 4.
3. Plaintiff-Appellant's Exhibit 6.

Dated: January 27, 1949.

/s/ WILLIAM S. TYSON,
Solicitor.

/s/ BESSIE MARGOLIN,
Assistant Solicitor.

/s/ KENNETH C. ROBERTSON,
Regional Attorney.

/s/ JAMES F. SCOTT,

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Attorneys for Appellant.

[Endorsed]: Filed January 27, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION AS TO ORIGINAL EXHIBITS

The parties hereto respectfully request that the following designated exhibits be considered by the Court in their original form, and that the Court dispense with their reproduction in the printed transcript of the record:

1. Plaintiff-Appellant's Exhibit 3.
2. Plaintiff-Appellant's Exhibit 4.
3. Plaintiff-Appellant's Exhibit 6.

Dated: February 3, 1949.

/s/ WILLIAM S. TYSON,
Solicitor.

/s/ BESSIE MARGOLIN,
Assistant Solicitor.

/s/ KENNETH C. ROBERTSON,
Regional Attorney.

/s/ JAMES F. SCOTT,
Senior Attorney, United States Department of Labor,
Attorneys for Appellant.

/s/ CARL E. DAVIDSON,
/s/ CHARLES P. DUFFY,
Attorneys for Appellee.

[Endorsed]: Filed February 7, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER AS TO ORIGINAL EXHIBITS

The parties having filed their stipulation herein and good cause therefor appearing, It Is Ordered that the following exhibits and parts of the record designated as necessary for consideration by this Court need not be reproduced in the printed transcript of record but will be considered by the Court in their original form:

1. Plaintiff-Appellant's Exhibit 3.
2. Plaintiff-Appellant's Exhibit 4.
3. Plaintiff-Appellant's Exhibit 6.

Dated: February 4, 1949.

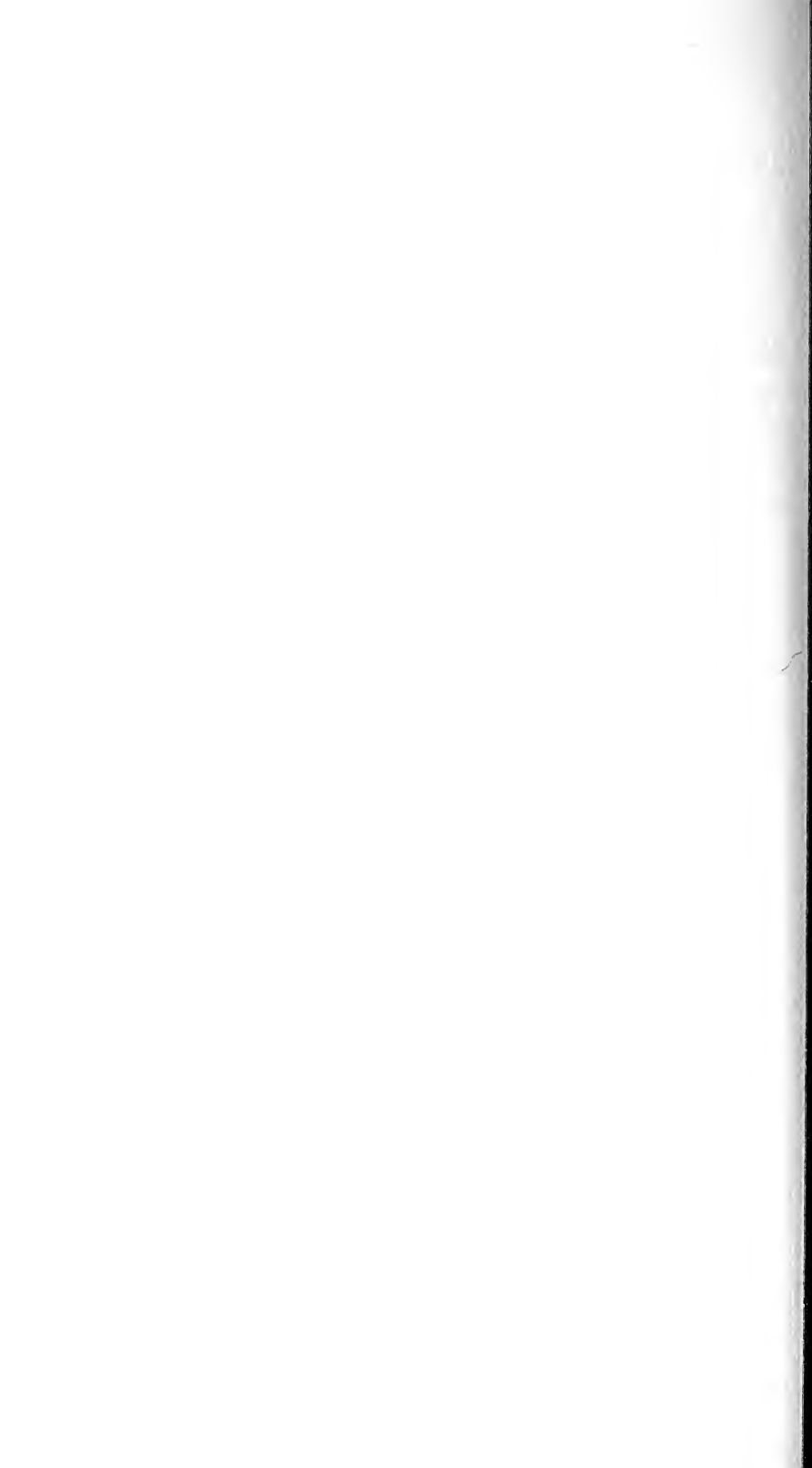
So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ CLIFTON MATHEWS,
/s/ WILLIAM HEALY,

United States Circuit Judges.

[Endorsed]: Filed February 7, 1949. Paul P. O'Brien, Clerk.



No. 12154

**In the United States Court of Appeals
for the Ninth Circuit**

**WILLIAM R. McCOMB, ADMINISTRATOR OF THE WAGE
AND HOUR DIVISION, UNITED STATES DEPARTMENT OF
LABOR, APPELLANT**

v.

**ROW RIVER LUMBER COMPANY, A CORPORATION,
APPELLEE**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON**

BRIEF FOR APPELLANT

WILLIAM S. TYSON,

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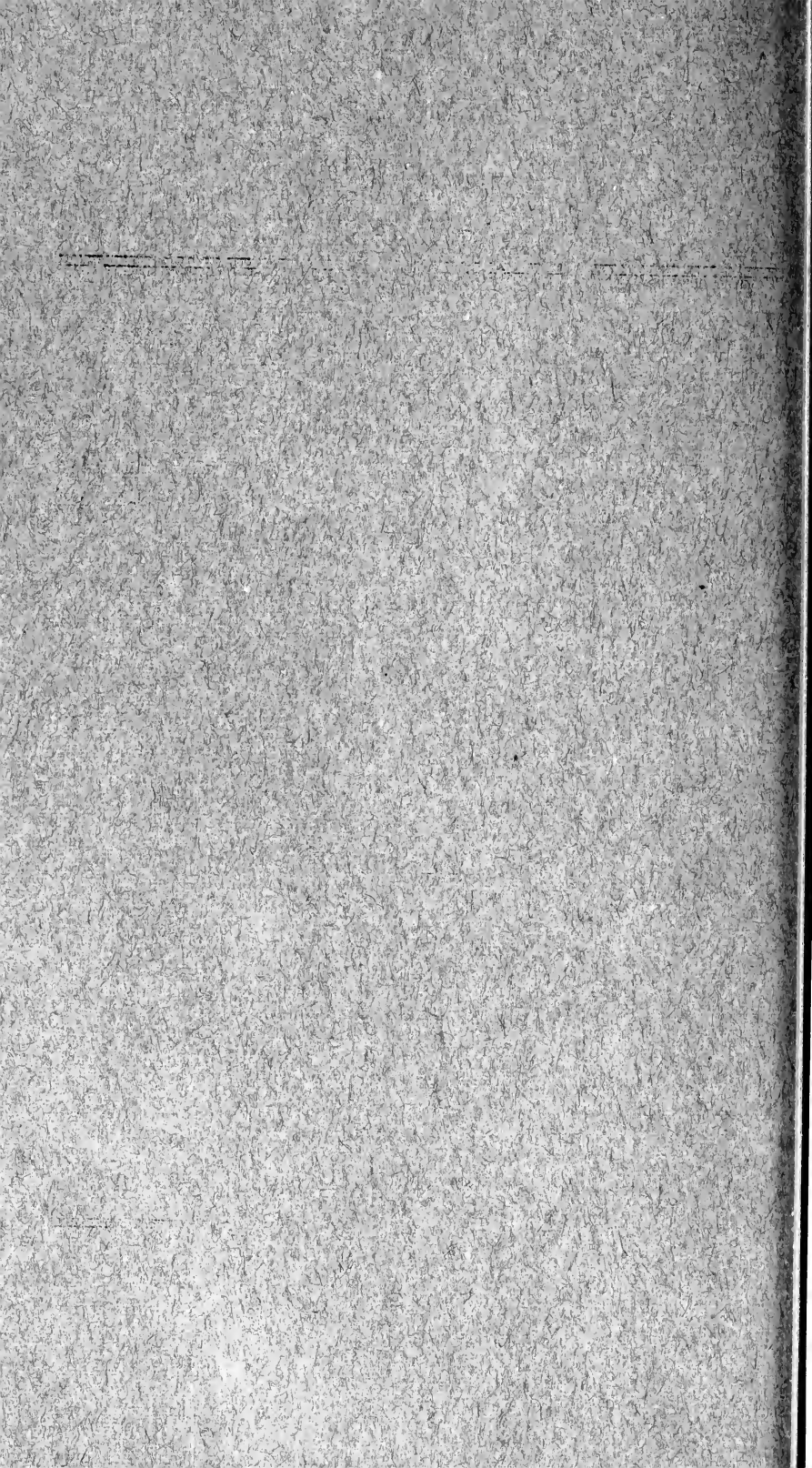
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FILED

JULY 16 1949

PAUL P. O'BRIEN



INDEX

| | Page |
|---|------|
| Statement of jurisdiction..... | 1 |
| Statement of the case..... | 2 |
| Questions presented..... | 7 |
| Specification of errors..... | 8 |
| Summary of argument: | |
| I. | 8 |
| II. | 9 |
| Argument: | |
| I. Appellee's cook is not an executive or administrative em- ployee within the exemption provided by Section 13 (a) (1) of the Act..... | 10 |
| II. The cook's helper is an employee of appellee within the meaning of the Act..... | 20 |
| Conclusion..... | 28 |
| Appendix..... | 30 |

CITATIONS

| Cases: | |
|---|----------------------------|
| <i>Armstrong v. Walling</i> , 161 F. (2d) 515..... | 16 |
| <i>Bartels v. Birmingham</i> , 332 U. S. 126..... | 28 |
| <i>Bender v. Crucible Steel Co.</i> , 170 F. (2d) 691..... | 16 |
| <i>Benedict v. United States</i> , 176 U. S. 357..... | 15 |
| <i>Bowles v. Seminole Rock & Sand Co.</i> , 325 U. S. 410..... | 15 |
| <i>Buffalo Steel Co. v. Aetna Life Ins. Co.</i> , 136 N. Y. Supp 977..... | 24 |
| <i>Chattanooga Implement & Mfg. Co. v. Harland</i> , 146 Tenn. 85, 239 S. W. 421..... | 23 |
| <i>Chepard v. May</i> , 71 F. Supp. 389..... | 15 |
| <i>Commonwealth v. Hong</i> , 261 Mass. 226, 158 N. E. 759..... | 24 |
| <i>Consolidated Timber Co. v. Womack</i> , 132 F. (2d) 101..... | 10 |
| <i>Curtis & Gartside Co. v. Pigg</i> , 39 Okla. 31. 134 Pac. 1125..... | 24 |
| <i>Fahs v. Tree-Gold Co-op. Growers of Florida</i> , 166 F. (2d) 40..... | 27 |
| <i>Fanelli v. United States Gypsum Co.</i> , 141 F. (2d) 216..... | 13 |
| <i>George Lawley & Son Corp. v. South</i> , 140 F. (2d) 439, certiorari denied, 322 U. S. 746..... | 13, 18 |
| <i>Gorchakoff v. California Shipbuilding Corp.</i> , 63 F. Supp. 309..... | 15 |
| <i>Graham v. Goodwin</i> , 170 Miss. 896, 156 So. 513..... | 24 |
| <i>Helliwell v. Haberman</i> , 140 F. (2d) 833..... | 13 |
| <i>Jones v. Goodson</i> , 121 F. (2d) 176..... | 22 |
| <i>Lassiter v. Atkinson Co.</i> , 162 F. (2d) 774..... | 13, 19 |
| <i>Lehigh Valley Coal Co. v. Yensavage</i> , 218 Fed. 547..... | 25 |
| <i>McComb v. McKay</i> , 164 F. (2d) 40..... | 26, 27 |
| <i>McComb v. Rutherford Food Corp.</i> , 331 U. S. 722..... | 9, |
| | 10, 21, 22, 23, 25, 26, 28 |
| <i>McComb v. Western Union Tel. Co.</i> , 165 F. (2d) 65, certiorari denied, 333 U. S. 862..... | 26 |

(I)

Cases—Continued

Page

| | |
|---|--------|
| <i>National Labor Relations Board v. Hearst Publications</i> , 322 U. S. 111 | 28 |
| <i>Packard Motor Car Co. v. National Labor Relations Board</i> , 330 U. S. 485 | 21 |
| <i>People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.</i> , 225 N. Y. 25, 121 N. E. 474 | 24, 25 |
| <i>Purtell v. Philadelphia & Reading Coal & Iron Co.</i> , 256 Ill. 110, 99 N. E. 899 | 24 |
| <i>Roland Electrical Co. v. Walling</i> , 326 U. S. 657 | 16 |
| <i>Schmidtke v. Conesa</i> , 141 F. (2d) 634 | 8, 12 |
| <i>Skidmore v. Swift & Co.</i> , 323 U. S. 134 | 16 |
| <i>Smith v. Porter</i> , 143 F. (2d) 292 | 13 |
| <i>Southern Railway Co. v. Black</i> , 127 F. (2d) 280 | 22 |
| <i>United States v. Silk</i> , 331 U. S. 704 | 28 |
| <i>Walling v. American Needlecrafts Co.</i> , 139 F. (2d) 60 | 26 |
| <i>Walling v. Brooklyn Braid</i> , 152 F. (2d) 938 | 16 |
| <i>Walling v. Cohen</i> , 140 F. (2d) 453 | 16 |
| <i>Walling v. General Industries Co.</i> , 330 U. S. 545 | 8, 13 |
| <i>Walling v. Morris</i> , 155 F. (2d) 832, reversed on other grounds, 332 U. S. 422 | 15, 18 |
| <i>Walling v. Portland Terminal Co.</i> , 330 U. S. 148 | 22 |
| <i>Walling v. Reid</i> , 139 F. (2d) 323 | 13 |
| <i>Williams v. Jacksonville Terminal Co.</i> , 315 U. S. 386 | 22 |

Federal Statutes:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C.

201 et seq.:

| | |
|----------------------------------|----------------------|
| Sec. 3 (d) | 9, 11 |
| Sec. 3 (j) | 10 |
| Sec. 7 | 11 |
| Sec. 13 (a) (1) | 8, 9, 10, 11, 12, 13 |
| Sec. 15 (a) (1) | 10 |
| Sec. 17 | 1, 11 |
| 28 U. S. C. Secs. 1291, 1294 (1) | 2 |

Miscellaneous:

| | |
|---|--------------------|
| 81 Cong. Rec. 7657 (1937) | 25 |
| 29 C. F. R. Cum. Supp. Part 541, Secs. 541.1 and 541.2 | 9, |
| | 11, 14, 15, 17, 19 |
| Federal Rules of Civil Procedure, Rule, 15 (b) | 12 |
| Federal Rules of Civil Procedure, Rule 52 (a) | 17 |
| 3 Labor Cas. (CCH) par. 25,210.123 | 16 |
| Regulations Part 516, sec. 516.7 (6 F. R. 4698) | 19 |
| Release A-9, 3 Labor Cas. (CCH) par. 25,219.043 | 15 |
| Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, Wage Hour Manual (1949) 20: 83 at 20: 101, 20: 109 | 15 |
| Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, Wage Hour Manual (1949) 20: 105 | 18 |
| Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, Wage Hour Manual (1949) 20: 92 | 17 |
| Webster's New International Dictionary, 2d Edition, unabridged (1946) | 15 |

In the United States Court of Appeals for the Ninth Circuit

No. 12154

**WILLIAM R. McCOMB, ADMINISTRATOR OF THE WAGE
AND HOUR DIVISION, UNITED STATES DEPARTMENT OF
LABOR, APPELLANT**

v.

**ROW RIVER LUMBER COMPANY, A CORPORATION,
APPELLEE**

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON*

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

This action was instituted by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act of 1938,¹ to enjoin defendant from violating the record-keeping, overtime, and shipment provisions of the Act (R. 2-6). That section expressly confers jurisdiction on the district courts of the United States to restrain the alleged violations of the Act.²

¹ C. 676, 52 Stat. 1060, 29 U. S. C., sec. 201 et seq., hereinafter called "the Act."

² Section 17 provides in pertinent part: "The district courts of the United States * * * shall have jurisdiction, for cause

After a trial of the issues, the District Court of the United States for the District of Oregon entered a judgment denying the injunction and dismissing the complaint (R. 15-16). This Court has jurisdiction to review the judgment below under Title 28, United States Code, sections 1291 and 1294 (1).

STATEMENT OF THE CASE

Except for certain modifications indicated in the summary below, appellant agrees in substance with the district court's findings of fact (R. 9-14). Briefly summarized, the facts are as follows:

The appellee, an Oregon corporation with its principal office in Portland, Oregon, is engaged in the production of lumber at a sawmill and planing mill located about thirteen miles from Cottage Grove, Oregon (fdg. 2, R. 10). The appellee's mills, mill office, mill pond, loading dock and railroad tracks, bunkhouse and cookhouse are located on a 35-acre tract of land owned by the appellee (fdg. 3, R. 10).

The cookhouse, originally a bunkhouse which was remodelled by appellee in the latter part of 1942 (fdg. No. 4, R. 10), is located approximately 150 feet from the mills (R. 62).³ It consists of a kitchen, store room, dining room and living quarters for the

shown, * * * to restrain violations of Section 15." Section 15 prohibits the violations here alleged.

³ The appellee originally spent \$1,986.88 for labor and material to remodel the building subsequently used as a cookhouse; in addition, appellee spent \$416.95 in 1946 to add a wing as living quarters for the cook's helper, and in 1947 expended \$312.33 to improve the ventilation of the building (R. 168 and Interrog. VIII, XV, and XVI, R. 43, 44, 48, 49).

cook and her family and for the kitchen helper (R. 37).⁴ Appellee not only owns the cookhouse but has borne the entire cost of its maintenance and repair and of the furnishing and replacement of cooking, eating, and culinary facilities and equipment (fdg. 4, R. 10).⁵ The appellee, moreover, expends several hundreds of dollars annually to furnish the water, fuel and electricity necessary for the operation of the cookhouse (Interrog. XVII, 10, 11, R. 44, 45, 49, fdg. 4), and, in short, furnishes "everything but the food and labor." (R. 164).

Since it was originally opened in 1942, the cookhouse has been in uninterrupted use, and, with very few exceptions, it has been open seven days a week to feed appellee's employees (R. 65-66, 133). Except for the public eating places in Cottage Grove, thirteen miles away, there is no other public eating place available for the employees of the Row River Lumber Company (R. 65), and the employees who live at the bunkhouse would be unable to work at the mill if they were not able to get their meals at the cookhouse (fdg. 14, R. 13, 14). In addition, the cook also prepares box lunches for the woods crew and serves lunch at the

⁴ The lodging furnished free to the cook and the kitchen helper was valued in 1947 at \$360 for the cook and at \$120 for the helper (Interrog. XVIII, XIX, R. 45, 49).

⁵ The original cost of the equipment furnished by the appellee was \$72.93 (Interrog. X, XI, R. 43, 48); in addition, equipment owned by one of appellee's officers was also furnished (R. 204, 205). Appellee further spent \$129.34 in 1946 and \$887.87 in 1947 to replace or repair cookhouse equipment (Interrog. XII, XIV, R. 43, 44, 48).

cookhouse to some employees who work at the mill-site but who live off the premises (R. 66, 143).

The personnel operating the cookhouse has consisted, at all times since its inception, of only two persons, a cook and a cook's helper (R. 121, 176, 177). The cooks who have worked there since 1942 simply agreed orally with one or another of the company's officials to operate the cookhouse in a satisfactory manner (R. 73, 211). "The cook is retained under an oral agreement which has no definite time to run and can be ended by either party without notice" (fdg. 5, R. 11). It was the cook's duty "to furnish meals to all the employees who chose to eat at the cook-house" (R. 119) and in the performance of this duty she was required to work "regularly and steadily every day" (R. 145) a total of about 73 hours a week (fdg. 18, R. 14). The cook herself devotes her full time to working for appellee. While thus engaged she does not hold herself out to other mills as being in the market to cook for them (fdg. 10, R. 12).

Though the court below found that "The cook's duties require special aptitude and considerable managerial skill" (fdg. 14, R. 13), the undisputed evidence is that the cook had no responsibilities of management other than merely purchasing and cooking the food (R. 101), to produce plain meals (R. 90-91), which require only the knowledge ordinarily acquired by a cook or housewife in a home kitchen (R. 110, 177). The incumbent at the time this suit was instituted was just a "fair" cook who like many household cooks assumed the task of personally buying as

well as cooking the food (R. 121). The work of her one assistant is confined to making toast, peeling potatoes, setting tables, carrying food to tables after it is dished up, doing the dining room work, and washing dishes (R. 122).

Even though the nature of the cook's work required little supervision, the mill superintendent had the authority to issue instructions and exercise supervision with respect to the cook's activities and "If [he] had a cook at the cookhouse who did require instructions and supervision * * * [he] would * * * exercise that supervision and give her the instructions [he] thought necessary" (R. 77, 78). Thus, as one of the cooks stated, "the cookhouse and dining room must be operated to the satisfaction of [appellee's officials]" and "if the meals * * * serve[d] were not satisfactory * * * they could terminate [her] services" (R. 127, 130). Accordingly, the mill superintendent ate at the cookhouse an average of one meal a week, and made "it a point to observe the condition of the cookhouse and to see how things are being operated there" (R. 88-89). And, although generally its operation has been satisfactory, the mill superintendent has taken corrective action when it was deemed necessary (R. 75, 76). Moreover, the company has also participated in the management and operation of the cookhouse. During the war, appellee on its own initiative successfully applied for additional ration points to provide more food for its logging crew (R. 191, 194, 220); in addition, when it was difficult to purchase food in the vicinity of the mill-site, appellee helped the cook to

buy it in Portland (R. 123-126, 228-229). For the purchase of cookhouse supplies and equipment, the cook was authorized by the company to make expenditures for which she was reimbursed, or to make binding commitments for payment by the company (fdg. 15, R. 13). Further, on one occasion when a cook became ill, the company hired and paid a cook's helper to assist the substitute cook (fdg. 15, R. 13); appellee, moreover, withheld part of the helper's wages for income tax purposes, and held up the helper's check until she acquired a social security card (R. 189).

The cook was not paid a salary or either straight time or overtime wages by the appellee. Instead, appellee's employees who ate at the cookhouse had deducted from their wages a fixed amount (40 to 60 cents) for each meal eaten (fdg. 7, R. 11). In addition, appellee paid the cook a subsidy of from 10 to 15 cents out of its own funds for each meal served (fdg. 7, R. 11). At the end of each month the cook turns in to the mill office the number of meal tickets which correspond to the number of meals served, and appellee's Portland office, where the tickets are sent, prepares and forwards a check and itemized statement to the cook (R. 39, 82, 122-123, 155). The subsidy is also paid on meals served employees of appellee's independent contractors (R. 232-233). The subsidy was utilized by appellee as a means of attracting manpower from Cottage Grove, where there were competing mills, by offering inexpensive meals to employees, and, also, to absorb part of the cook's expense

of running the cookhouse so that "she could make something" (R. 207, fdg. 8, R. 11-12). In 1947 the subsidy accounted for 96.3 percent of the cook's net earnings (fdg. 13, R. 13). The "final determination" that increases in the price per meal could be instituted was made by appellee, and the cook never deviates from the price thus set (fdg. 9, R. 12).

Upon these facts, the district court concluded that both the cook and her helper were engaged in the production of goods for interstate commerce, that the cook was an employee of the appellee within the meaning of the Fair Labor Standards Act, and that appellee has not kept the records of the cook required by the Act and regulations. The complaint was dismissed, however, on the grounds that the cook was exempt from the overtime provisions of the Act as "an executive and administrative" employee, and that the helper was not an employee of the appellee (concls. of law, R. 14-15). The conclusion that the cook was an "executive or administrative" employee apparently was predicated on the district court's belief that simply "by an exercise in semantics"—"merely by designating as salary what is now called profit, the defendant could put the cookhouse manager beyond the purview of the Act, as an executive or administrative employee" (R. 8). No reason was given by the court for its conclusion that the cook's helper was not appellee's employee.

QUESTION PRESENTED

1. Whether the cook for appellee's cookhouse is an executive or administrative employee within Section

13 (a) (1) of the Fair Labor Standards Act as those terms have been defined and delimited by the Administrator.

2. Whether a cook's helper, hired and paid by appellee's cook with appellee's acquiescence, is an "employee" of appellee within the meaning of the Act.

SPECIFICATION OF ERRORS

1. The court below erred in holding that the cook was exempt as an executive and administrative employee under Section 13 (a) (1) of the Act.

2. The court below erred in holding that the cook's helper was not an employee of appellee within the meaning of the Act.

3. The court below erred in failing to grant an injunction and in dismissing the complaint.

SUMMARY OF ARGUMENT

I

The district court's conclusion of law that the cook was an "executive" or "administrative" employee cannot be sustained on this record. As the burden of pleading this exemption lies with the employer, the court below erred in concluding that the exemption applied when no issue as to it was raised by the pleadings and the trial was not conducted with reference to it (*Schmidke v. Conesa*, 141 F. (2d) 634 (C. A. 1)). As the burden of proving the facts on which exemption depends also rested on the defendant (*Walling v. General Industries*, 330 U. S. 545, 548), it was error to conclude that the cook was exempt without first making findings of fact as to all of the requirements for

exemption prescribed in the applicable regulations (29 C. F. R. Cum. Supp. Sec. 541.1 and 541.2) issued pursuant to Section 13 (a) (1) of the Act. The evidence in the record bearing on the point, far from meeting the burden of proof, affirmatively shows that the cook's duties do not satisfy the requirements of at least four of the conditions of the regulations defining the "executive" capacity, nor any of the requirements of the regulations defining the "administrative" capacity.

II

The cook's helper is unquestionably an "employee" within the contemplation of the Act and the only question is whether the responsibility for her working standards rests upon the proprietor of the business or solely upon the cook. It would seem to follow, *a fortiori*, from the finding that the cook is appellee's employee, that appellee is also the employer of the cook's helper. Clearly the cook, in hiring the helper, was acting "directly * * * in the interest of" her employer within the literal terms of the definition of "employer" in Section 3 (d) of the Act.

The Supreme Court's decision in *McComb v. Rutherford Food Corp.*, 331 U. S. 722, is controlling here and conclusively establishes appellee's responsibility as the employer of the cook's helper as well as of the cook. The *Rutherford* case establishes that an employer cannot escape responsibility under the Act by interposing an intermediary to whom the authority to hire and fire and pay wages is delegated. Many of the circuit courts of appeals, applying the principles of the

Rutherford case, have concluded, on the basis of employment relations comparable to the conditions of the instant case, that the responsibility for maintaining the statutory labor standards rests upon the owner or operator of the business and cannot be delegated to an intermediary or middleman.

ARGUMENT

I

Appellee's cook is not an executive or administrative employee within the exemption provided by Section 13 (a) (1) of the Act

The district court's findings and conclusions that the cook is an employee of appellee (concl. of law 2, R. 14) who is engaged in the production of goods for interstate commerce⁶ (concl. of law 3, R. 14) and that she works about 73 hours per week without extra compensation for overtime for that part of her work in excess of 40 hours per week (fdg. 18, R. 14), require the conclusion that appellee is in violation of Section

⁶ Section 3 (j) provides that "* * * for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed * * * in any process or occupation necessary to the production thereof * * *." That cookhouse employees such as these come within the phrase was decided by this Court in *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101.

As the district court also found that "substantially all" of such goods are "sold and shipped in interstate commerce" (fdg. 2, R. 10), this practice also resulted in violation of Section 15 (a) (1) which provides that "* * * it shall be unlawful for any person—(1) to * * * ship * * * or sell * * * in commerce * * * any goods in the production of which any employee was employed in violation of * * * Section 7 * * *."

7 and should be enjoined under Section 17, unless the district court's conclusion that the cook was exempt as an executive and administrative employee within Section 13 (a) (1) can be sustained. The latter conclusion is plainly untenable.

Section 13 (a) (1) provides that "The provisions of Sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, [or] administrative * * * capacity * * * (as such terms are defined and delimited by regulations of the Administrator)." Pursuant to this authority, the Administrator has issued appropriate regulations defining and delimiting these terms. These are set out in the Appendix, *infra*, pp. 30-31.

As Section 13 (a) (1) creates a special exception or exemption to the general requirement of Section 7, the burden was on defendant to plead it affirmatively. It appears, however, that there is no mention of this exemption in the pleadings, or even in the statements of counsel, nor was any reference made to the exemption in the testimony of witnesses or in the remarks of the court during the trial. There was no suggestion of any intent to assert this defense (R. 2-8, 28-234). The trial was concerned solely with the issue raised by the answer—whether the cook and her helper were employees of appellee. The Administrator, therefore, had no reason to produce evidence on the question of exemption or to examine the witnesses concerning that possibility. Not until the memorandum opinion of the district court was filed, subsequent to the trial (R. 8-9), was any suggestion made that such a defense might be claimed or held

applicable. The law in this situation is best summarized in *Schmidke v. Conesa*, 141 F. (2d) 634 (C. A. 1), where, as in this case, no issue on the Section 13 (a) (1) exemption was framed by the pleadings, and the trial was not conducted with reference to any such issue. The court of appeals vacated the judgment of the district court, which had dismissed the complaint on a finding that plaintiff was exempt under Section 13 (a) (1), stating its reasons as follows:

Since the Act is in its nature remedial, its exemptions are to be strictly construed and one claiming their benefit must bring his case within both their letter and spirit. *Bowie v. Gonzales*, 1 Cir., 117 F. 2d 11, 16. From this and also according to ordinary principles of pleading it follows that a plaintiff, in order to state a cause of action under the Act, is not required to allege that its exemptions are inapplicable. *Stratton v. Farmers Produce Co.*, 8 Cir., 134 F. 2d 825, 827. Exemption is a matter of defense which must be alleged as a special defense under Rule 8 (c), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, and this the defendant did not even attempt to do. [141 F. (2d) at 635.]

The error of the court below in this respect is not remedied by the addition of the statement "The pleadings and pre-trial order may be deemed amended accordingly" to the district court's conclusion of law No. 5 (R. 15) holding the cook exempt. Rule 15 (b) of the Federal Rules of Civil Procedure authorizes such amendments only "When issues not raised by

the pleadings are tried by express or implied consent of the parties.” This condition plainly did not exist in this case for no issue of exemption under Section 13 (a) (1) was tried, and as appellant’s counsel was in no way advised of the existence of any such issue, he cannot be considered to have consented to such a trial.

In any event, neither the evidence introduced in the trial of the employment issue which happens fortuitously to relate also to the conditions on which the exemption depends, nor the findings of fact made by the district court, support the conclusion that “The cook is an executive and administrative employee as defined in the regulations” (R. 15). It is now too well settled to require argument that the employer has “the burden of proving the existence of these conditions, if it would rely on its defense” of exemption under Section 13 (a) (1) (*Walling v. General Industries Co.*, 330 U. S. 545, 548; *Lassiter v. Guy F. Atkinson*, 162 F. (2d) 774 (C. A. 9)).⁷ The court below was not free to reach the conclusion of law that the cook was exempt, therefore, until it made findings of fact establishing the existence of each of the conditions for exemption required by the regulations. This, the court did not, and on the evidence in the record could not, do.

⁷ Also in point and to the same effect are *Helliwell v. Haberman*, 140 F. (2d) 833 (C. A. 2); *Fanelli v. United States Gypsum Co.*, 141 F. (2d) 216 (C. A. 2); *Smith v. Porter*, 143 F. (2d) 292 (C. A. 8); *Walling v. Reid*, 139 F. (2d) 323 (C. A. 8); *George Lawley & Son Corp. v. South*, 140 F. (2d) 439 (C. A. 1), certiorari denied 322 U. S. 746.

On the contrary, such relevant evidence as was introduced affirmatively shows that many of the requirements for exemption were not met.⁸ It is at once apparent that the cook cannot qualify under the "executive" exemption because she was not employed on a "salary basis" as required by Section 541.1 (A) of the regulation, nor can the cook qualify under the "administrative" exemption because she was not employed on a "salary or fee basis" as required by Section 541.2 (A). The cook's entire cash payment for her employment was the surplus or "profit," if any, remaining from the meal price paid by those who ate at the cookhouse, as supplemented by the subsidy paid by appellee after the cost of the groceries used and the cash wage of the helper were deducted (R. 105). Obviously, under these circumstances the cook's wage from her employment is subject to variation not only with the price of groceries, but also with the number of meals served. Such payments plainly do not constitute a "salary" or a "fee" within natural and ordinary meaning of those terms. Nor could they become a salary "merely by designating" them as such—"by an exercise in semantics"—as assumed by the court below. "Salary" connotes "a fixed annual or periodical payment for services depending upon the time and not upon the amount of services ren-

⁸ It is well settled that where the conditions of the regulations are phrased in the conjunctive, all of them must be met in order for the exemption to apply. *George Lawley & Son Corp. v. South, Fanelli v. United States Gypsum Co.*, and *Smith v. Porter*, *supra*, n. 7.

dered," and it is not a "variable quantity" (*Benedict v. United States*, 176 U. S. 357, 360; see also Webster's New International Dictionary, 2nd Edition, unabridged (1946)). A "fee" is "compensation, often a fixed charge, for professional services or for special and requested exercises of talent or of skill, as by an artist." (Webster's New International Dictionary, 2nd Edition, unabridged (1946)). The Administrator, in using these terms in his regulations, intended them to have their generally accepted meaning, and he has so construed them in the official interpretation of his regulations.⁹ This interpretation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulations." (*Bowles v.*

⁹ See "Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition" (adopted by the Administrator as his official interpretation of the regulations) Wage-Hour Manual (1949) 20:101, 20:109.

On August 24, 1944, the Administrator restated his position with respect to "salaried employees," as follows (Release A-9, 3 CCH Par. 25,219.043): "An employee will be considered to be paid on a 'salary basis' within the meaning of sections 541.1, 541.2, or 541.3 of Regulations, Part 541, if under his employment agreement he regularly receives each pay period, on a weekly, biweekly, semimonthly, monthly or annual basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to variations in the number of hours worked or in the quantity or quality of the work performed during the pay period." Thus, employment on an hourly basis has been held not to satisfy the salary requirements of the Administrator's definition. *Walling v. Morris*, 155 F. (2d) 832 (C. A. 6), (reversed on other grounds, 332 U. S. 422); *Gorchakoff v. Calif. Shipbuilding Corp.*, 63 F. Supp. 309 (S. D. Calif.); *Chepard v. May*, 71 F. Supp. 389 (S. D. N. Y.).

Seminole Rock and Sand Co., 325 U. S. 410, 414).¹⁰

Though the Administrator has recognized that a guarantee of \$30 a week in the case of an executive, or \$200 per month in case of an employee employed in a bona fide administrative capacity will satisfy the salary requirement even if additional compensation may be earned on some other and variable basis,¹¹ the only guarantee in this case, that "The cook is not subject to any actual loss in her operation of the cookhouse" (fdg. 13, R. 13) plainly fails to measure up to this requirement.

Appellee's cook also fails to satisfy at least two other essential requirements of the "executive" regulations—i. e., she does not regularly and customarily direct the work of other employees and she does not customarily and regularly exercise discretionary powers. The lower court found that at any one time the cook had only one helper (fdg. 6, R. 11). The regulations, however, require an "executive" employee regularly and customarily to direct the work

¹⁰ See also *Armstrong Co. v. Walling*, 161 F. (2d) 515, 517 (C. A. 1); *Walling v. Brooklyn Braid Co.*, 152 F. (2d) 938, 940 (C. A. 2); *Walling v. Cohen*, 140 F. (2d) 453, 456 (C. A. 3). The Administrator's interpretation of his own regulations stand on an even more authoritative footing than interpretations of sections of the Act which give no special regulatory power, but which are issued by the Administrator as "a practical guide to employers and employees as to how the office representing the public interest in * * * enforcement [of the law] will seek to apply it." *Skidmore v. Swift & Co.*, 323 U. S. 134, 138. cf. *Roland Electrical Co. v. Walling*, 326 U. S. 657, 676.

¹¹ Ruling reported in 3 CCH Labor Law Rep. Par. 25,210.123 (1948) and noted in *Bender v. Crucible Steel Co.*, 170 F. (2d) 691, fn. 1 (C. A. 3).

of "other employees"—that is, more than one. The official interpretations of the Administrator indicate that "the plural form was used deliberately * * * because it was felt that an employee, to be a true 'executive' should direct the work of at least two other persons" (Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, Wage Hour Manual (1949) 20:92).

Further, there is no showing in the record that the cook "customarily and regularly exercises discretionary powers." The "finding" of the court below that her "duties require special aptitude and managerial skill" (fdg. 14, R. 13), even if it were sustained by the evidence, fails to measure up to this requirement. But in any event, the finding is "clearly erroneous" and should be set aside under Rule 52 (a) of the Federal Rules of Civil Procedure, in view of the uncontradicted evidence that the cook had no responsibility of management other than merely purchasing and cooking the food (R. 101) to produce plain meals (R. 90-91) which requires only the knowledge ordinarily acquired by a cook in a home kitchen (R. 110, 121, 177). As the lower court remarked during the trial, the meals consisted of "meat and potatoes in a logging camp and lots of dessert" (R. 127). Clearly the making of decisions with respect to such a "menu" does not constitute exercise of the "discretionary powers" (Sec. 541.1 (D) of the regulation) which are characteristic of a "true executive" as described in the Report and Recommendations of the Presiding Officer (Wage-Hour Manual (1949) (20:92)).

Appellee's cook does not qualify any better for the "administrative" exemption. In addition to the fact that she does not meet the essential salary requirement, which in itself defeats the exemption, the evidence affirmatively shows that she does not meet any one of the three alternative requirements of the second portion of the administrative regulation.¹² *George Lawley & Son Corp. v. South*, 140 F. (2d) 439 (C. A. 1), certiorari denied 322 U. S. 746. Each of these alternatives require that the employee's duties be "non-manual" in nature. The exemption was intended only for "'white collar' employees" performing administrative functions (Report of the Presiding Officer, Wage-Hour Manual 20:105), and does not include those performing work of a "physical and manual character" (*Walling v. Morris*, 155 F. (2d) 832, 836 (C. A. 6)). The fact that the cook must, as her title implies, personally cook all of the food (the duties of her one assistant being confined to making toast, peeling potatoes, setting tables, carrying food to tables after it is dished up, doing the dining room work, and washing dishes (R. 121, 122)) clearly shows that this requirement is not met. Similarly, each of the three alternatives provide that the employee's duties "require the exercise of discretion and independent judgment." As previously pointed out with reference to "discretionary powers" under

¹² The fourth alternative is not discussed because its restriction to persons "transporting goods or passengers for hire" makes it plainly inapplicable.

the "executive" definition, there is no evidence to support the view that the cook in the instant case exercises "any important measure of discretion or independent judgement." See *Lassiter v. Guy F. Atkinson*, 162 F. (2d) at 778. Lastly, there is nothing in the record to indicate that the cook "regularly and directly assists an employee employed in a bona fide executive or administrative capacity," as required under the first alternative, or that her duties "directly related to management policies or general business operations," as required under the other two alternatives. On the contrary, the evidence that her duties were only with reference to the cookhouse (R. 101), affirmatively establishes that her work was not of such a nature. Thus, it is clear that her employment failed in every respect to satisfy the requirements prescribed in Section 541.2 (B) of the regulations defining "employee employed in a bona fide * * * administrative * * * capacity."

It should be noted that even if there were any basis for the ruling that the cook was exempt, the court's finding that appellee "has not kept the records of the cook required by the act and regulations" would suffice to require the issuance of an injunction. The regulations defining and delimiting the exemption require the keeping of certain records even with respect to exempt employees, inasmuch as such records are essential in order to determine whether the conditions of the exemption have been met.¹³

¹³ 29 Code of Federal Regulations, Part 516.7, 6 FR 4698. The pertinent provisions are printed in the Appendix, *infra*, pp. 31-32.

II

The cook's helper is an employee of appellee within the meaning of the Act

In concluding as a matter of law that the cook was an employee of appellee, the court below without giving any reasons simply stated "The helper is not" (concl. of law 2, R. 14). As the helper was engaged to perform a menial task for a fixed monthly wage (R. 139), there can be no question that she is an employee entitled to the protection of the Act. The only question that can be presented, therefore, is as to the identity of her employer—whether the responsibility rests upon appellee, who owns the cookhouse and the business and who permitted his cook to hire the helper, or whether this employee must look solely to the cook who herself is completely dependent upon appellee for her wages. Only on the theory that the cook is the helper's *sole* employer can it be concluded that appellee is relieved of obligation under the Act to keep the records with reference to her and see to it that she is compensated in compliance with the wage and hour provisions of the Act.

Since the court below found that the cook is appellee's employee, it is difficult to understand how it would not follow, *a fortiori*, that appellee is also the employer of the helper hired by the cook with appellee's acquiescence if not actually upon his direction. Plainly, the cook in hiring the helper was acting "directly * * * in the interest of" her employer within the literal terms of Section 3 (d) of the Act defining "employer."¹⁴ Also the purpose of

¹⁴ The pertinent portion of Section 3 (d) provides that "‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *."

the statutory definition "seems obviously to render employers responsible * * * for acts of any person performed in their interests." See *Packard Motor Car Co. v. National Labor Relations Board*, 330 U. S. 485, 489.

The Supreme Court's decision in *McComb v. Rutherford Food Corp.*, 331 U. S. 722, involving employment relationships closely analogous to those in the instant case, conclusively establishes that appellee is responsible under the Act as employer of the cook's helper. In the *Rutherford* case, a slaughter house operator engaged meat boners who were designated independent contractors under written contracts which provided that they should hire, compensate, supervise and control other boners as their own employees and perform the boning operations in the slaughter house as independent contractors. In a unanimous opinion, the Supreme Court held that the assistants, as well as the "contractor" boners who hired them, were employees of the slaughterhouse operator within the meaning of the Fair Labor Standards Act. In that case, as presumably in the instant case, the agreement between the owner and the intermediary (the "contractor," who corresponds to the cook in the instant case) provided that the intermediary, and not the operator, was to employ, compensate and "have complete control over" assistants "who would be his [the contractor's] employees." 331 U. S. at 724-725. In that case, as in the instant case, there was no direct contractual relation between the owner and the assistants hired by the intermediary, and the owner "never attempted to control the

hours of the boners "except generally to require that they "keep the work current," the hours depending in large measure upon the work of the other workers employed by the owner. *Id.* at 726. There, as here, the compensation of the assistants was fixed and paid by the intermediary.

The chief argument advanced to support the contention in *Rutherford* that the assistant boners were not the employees of the operator of the establishment was that the absence of any express or implied contractual obligation on the part of the owner to pay the compensation of the assistant boners relieved the owner of responsibility as their employer (relying upon certain language in the Supreme Court's earlier decision in *Walling v. Portland Terminal Co.*, 330 U. S. 148, 152). The Supreme Court rejected this argument pointing out that it had previously recognized red caps to be employees of the railroad company although their compensation was derived solely from passengers' tips. *Id.* at 729. See *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386; *Southern Railway Co. v. Black*, 127 F. (2d) 280 (C. A. 4); *Jones v. Goodson*, 121 F. (2d) 176 (C. A. 10). As the Court of Appeals for the Fourth Circuit said in response to a similar argument made in *Southern Railway Co. v. Black*, *supra*: "The determinative factor is not the source of their compensation * * *. We are not impressed with the argument that the companies can escape the payment of minimum wages to them [red caps] simply by providing that they shall look for compensation to tips from persons whom they assist." 127 F. (2d) at 281-282.

The determination of whether there is an employment relationship subject to the Act, the Supreme Court concluded in the *Rutherford* case, depends not upon any such "isolated factors" or upon any "label" used to describe the relationship (331 U. S. at 729), but "upon the circumstances of the whole activity" (*id.* at 730) considered in the light of the statutory purposes (*id.* at 727) and the Act's "own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category" (*id.* at 729). The Court further pointed out that "The definition of 'employ' is broad" and "evidently derives from the child labor statutes and it should be noted that this definition applies to the child labor provisions of this Act, § 12" (*id.* at 728).

This reference to the child labor statutes is of particular significance in the instant case, since those definitions had been construed to apply to virtually the same relationship as existed here between appellee and the cook's assistant. Thus, in *Chattanooga Implement & Mfg. Co. v. Harland*, 146 Tenn. 85, 239 S. W. 421 (1922), an operator of a mill was sued for injuries sustained by a minor under a statute making it unlawful "to employ, permit, or suffer" any child less than 14 years of age to work in any mill, factory, or workshop. The defendant had never entered into an employment relationship with the minor in the usual sense, but certain of defendant's regular employees had permitted the boy to help them and had

paid him out of their own piece-rate wages. The court held defendant liable. *Curtis & Gartside Co. v. Pigg*, 39 Okla. 31, 134 Pac. 1125 (1913), similarly involved a statute making it illegal for children to be "employed, permitted, or suffered" to work in certain operations. The minor had assisted in the prohibited hazardous occupations at the request of a fellow employee whose instructions he had been told to follow. "The inhibition is just as strong and positive," the court said, "against permitting or even suffering a child of this age to do such things as it is against employing him to do them. * * * If the statute went no farther than to prohibit employment, then it could be easily evaded by the claim that * * * he was not employed to do such work, nor was permission given him to do so. But the statute goes farther * * *. It means that he shall not *employ* by contract, nor shall he *permit* by acquiescence, nor *suffer* by a failure to hinder." [Italics the court's.]¹⁵

Appellee in the instant case does not merely acquiesce in the employment of the cook's helper, or negatively suffer and permit her to work on his premises, but furnishes her lodging which is part of her wage (fdg. 4, R. 10, 139), and, on occasion, hired and paid the kitchen helper and withheld income taxes from the wages it paid her (fdg. 15, R. 13), as well as

¹⁵ See also *Purtell v. Philadelphia & Reading Coal & Iron Co.*, 256 Ill. 110, 99 N. E. 899 (1912); *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N. Y. 25, 121 N. E. 474 (1918); *Commonwealth v. Hong.*, 261 Mass. 226, 158 N. E. 759 (1927); *Buffalo Steel Co. v. Aetna Life Ins. Co.*, 136 N. Y. Supp. 977, 983 (1915); *Graham v. Goodwin*, 170 Miss. 896, 156 So. 513, 514 (1934).

furnished and maintained the place and equipment used by her in her work (fdg. 4, R. 10).

As the Supreme Court recognized in the *Rutherford* opinion, the definition of the child labor statutes appears to have been adopted in the Fair Labor Standards Act deliberately and advisedly. Senator (now Mr. Justice) Black referred to the definition as "the broadest definition that has ever been included in any one Act" 81 Cong. Rec. 7657 (1937). This language thus must have been chosen deliberately to protect the basic labor standards from breaking down through just such shifting of responsibility as is attempted in this case. As stated by Judge Cardozo in *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N. Y. 25, 29, 121 N. E. 474, 476 (1918), under the terms of such statutory definitions, the employer "must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. * * * He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he has delegated 'his own power to prevent.' " It "misses the whole point of such statutes," as Judge Learned Hand pointed out in a comparable situation, if employees "are to have recourse as an employer only to one of their own, without financial responsibility or control of any capital" and who "is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers." (*Lehigh Valley Coal Co. v. Yensavage*, 218 Fed. 547, 552-553 (C. A. 2)).

The applicability of these observations to the Fair Labor Standards Act has been recognized not only by the Supreme Court in the *Rutherford* case, but by many of the circuit courts of appeals in circumstances similar to the instant case. The *Rutherford* case establishes that in such circumstances an employer cannot escape responsibility under the Act by interposing an intermediary to whom the authority to hire and fire and pay wages is delegated. In *McComb v. Western Union Telegraph Co.*, 165 F. (2d) 65 (C. A. 6), certiorari denied 333 U. S. 862, the company evolved a plan for converting its offices located in small towns into so-called agency offices under the control and operation of an "agent" who was ostensibly an independent contractor with authority to hire, fire, compensate, and supervise the workers in the agency office. The Sixth Circuit, holding that the personnel under their supervision, as well as the agents, were employees of the company, stated that "if one does suffer or permit another to work under circumstances where an obligation to pay will be implied, they are employer and employee under the act" 165 F. (2d) at 70. Similarly, in *Walling v. American Needlecrafts Co.*, 139 F. (2d) 60, homeworkers were held by the Sixth Circuit to be employees of the company even though another homemaker in some instances distributed and collected the work and the company neither paid directly nor even knew which workers were performing work for it (139 F. (2d) 62).

The Eighth Circuit reached a like conclusion in *McComb v. McKay*, 164 F. (2d) 40 (C. A. 8). Rely-

ing primarily on the *Rutherford* decision, the court held that a railroad company was the employer of personnel hired, fired, and paid by persons (McKay brothers) who enjoyed a considerably more independent status than appellee's cook. The McKays operated, essentially for the benefit of a railroad company, an establishment for the manufacture, repair, and storage of temporary grain and coal doors for freight cars. In supervising the yard's operation, they hired, fired, and paid the workers supervised by them, kept employment records, rendered bills to the railroad company for work performed at unit prices fixed by the railroad, and even made some investment in equipment. Although the arrangement contained "some possibility of gain or loss" to the McKays, the court emphasized that "unless the railroad fixes unit prices sufficient to cover production costs and some compensation for the McKays, the work * * * [would] cease." 164 F. (2d) at 49. Accordingly, it was the court's view that both the McKays and their workers were employees of the railroad company, upon which "from a practical standpoint [they were] completely dependent * * * for both work and pay" *id.* at p. 40.

See also to the same effect the decision of the Fifth Circuit with respect to the application of the Social Security Act. *Fahs v. Tree-Gold Co-op Growers of Florida*, 166 F. (2d) 40 (C. A. 5). Defendant, engaged in producing, harvesting, packing and marketing citrus fruits, engaged "contractors" in connection

with its packing house operations at a stipulated rate per box. The contractor in turn hired others to perform the work. There was little supervision, and no control by defendant, over the number of employees or their wages and hours. Relying upon the criteria of employment in the *Rutherford* case, as well as the *Hearst*, *Silk* and *Bartels* cases,¹⁶ the court held that the Act "is not limited to those whose services are subject to the direction and control of their employer, but rather to those who, as a matter of economic reality, are dependent upon the business to which they render service. * * * However the facts are weighed, they will not support a conclusion that the persons in question were not, as a matter of economic reality, dependent upon the taxpayer's business as their means of livelihood" 166 F. (2d) at 44.

The helper in this case is as fully dependent upon appellee for both work and pay as were the employees in all of the above cases. This dependency, we submit, is of controlling significance, for "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service" *Bartels v. Birmingham*, 332 U. S. 126, 130.

CONCLUSION

The rulings of the court below that the cook is exempt as an "executive" and "administrative" em-

¹⁶ *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111; *United States v. Silk*, 331 U. S. 704; *Bartels v. Birmingham*, 332 U. S. 126.

ployee, and the cook's helper is not appellee's employee, are erroneous and should be reversed.

Respectfully submitted.

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MAY 1949.

APPENDIX

29 C. F. R. Cum. Supp. Sec. 541.1 and 541.2
(7 F. R. 332) provides as follows:

Section 541.1.—Executive.

The term “employee employed in a bona fide executive * * * capacity” in section 13 (a) (1) of the act shall mean any employee—

“(A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

(B) who customarily and regularly directs the work of other employees therein, and

(C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and

(D) who customarily and regularly exercises discretionary powers, and

(E) who is compensated for his services on a salary basis of not less than \$30 per week (exclusive of board, lodging, or other facilities), and

(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch or establishment.

Section 541.2.—Administrative.

The term “employee employed in a bona fide * * * administrative * * * capacity” in section 13 (a) (1) of the act shall mean any employee—

(A) who is compensated for his services on a salary or fee basis at a rate of not less than \$200 per month (exclusive of board, lodging, or other facilities), and

(B) (1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or

(2) who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or

(3) whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment; or

(4) who is engaged in transporting goods or passengers for hire and who performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment.

* * * * *

29 C. F. R. Sec. 516.7 (6 FR 4698) provides as follows:

(a) *Items Required.*—Every employer shall maintain and preserve pay roll or other records

containing the following information and data on each and every employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman as defined in Part 541, *Regulations defining and delimiting the terms "Any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity or in the Capacity of Outside Salesman;"*

- (1) Name in full,
(And on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or pay roll records)
- (2) Home address,
- (3) Date of birth if under 19,
- (4) Occupation in which employed,
- (5) Time of day and name of the day on which the employee's workweek begins,
- (6) Basis on which wages are paid,
- (7) Total wages paid each pay period,
- (8) Date of payment and pay period covered by payment.

No. 12155

United States
Court of Appeals

for the Ninth Circuit

FILIPINO FEDERATION OF AMERICA,
INCORPORATED,

Appellant,

vs.

STANLEY NICHOLSON, a minor, by EDWARD
J. NICHOLSON, next friend and guardian ad
litem,

Appellee.

Transcript of Record

Appeal from the Supreme Court for the
Territory of Hawaii

FILED

MAR 28 1949

PAUL P. O'BRIEN,
CLERK

No. 12155

United States
Court of Appeals
for the Ninth Circuit

FILIPINO FEDERATION OF AMERICA,
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Appeal:

| | |
|--|----|
| Certificate of Clerk to Transcript of Record on | 32 |
| Citation on | 31 |
| Bond on | 26 |
| Designation of Points on (USCA)..... | 33 |
| Notice of | 25 |
| Order Allowing | 30 |
| Statement of Points on (USCA)..... | 33 |
| Assignment of Errors | 19 |
| Bond on Appeal | 26 |
| Certificate of Clerk to Transcript of Record on Appeal | 32 |
| Citation of Record on Appeal..... | 31 |
| Decision | 13 |
| Designation of Points on Appeal (USCA)..... | 33 |
| Judgment | 2 |
| Judgment on Decisions, Quashing Writ of Error and Denying Petition for Rehearing..... | 16 |

ii.

| | PAGE |
|---|------|
| Motion to Strike and Quash Writ of Error..... | 4 |
| Names and Addresses of Attorneys..... | 1 |
| Notice of Appeal | 25 |
| Order Allowing Appeal | 30 |
| Order Quashing Writ of Error..... | 7 |
| Petition for Rehearing | 8 |
| Praecipe for Transcript of Record..... | 28 |
| Statement of Points on Appeal (USCA)..... | 33 |
| Writ of Error | 3 |
| Return of Writ of Error | 4 |

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

L. No. 16344

STANLEY NICHOLSON, a minor, by EDWARD
J. NICHOLSON, next friend and guardian ad
litem,

Plaintiff,

vs.

FILIPINO FEDERATION OF AMERICA, IN-
CORPORATED, a foreign corporation, doing
business in the Territory of Hawaii,

Defendant.

Tort for Damages

JUDGMENT

Pursuant to the decision of the above-entitled
Court rendered and filed on July 13, 1948,

It Is Hereby Ordered, Adjudged and Decreed
that the Plaintiff do have and recover from the
Defendant the sum of Nine Thousand Six Hundred
Twelve and 70/100 Dollars (\$9,612.70) together
with the sum of \$100.00, allowed as costs to the
Plaintiff, or a total of \$9,712.70.

Dated at Honolulu, T. H., July 29, 1948.

(Seal) /s/ GEORGE KAHOIWAI,
Clerk, Circuit Court of First Judicial Circuit,
Territory of Hawaii.

[Endorsed]: Filed July 29, 1948. [4]

In the Supreme Court of the Territory of Hawaii

No. 2741

STANLEY NICHOLSON, a minor, by EDWARD
J. NICHOLSON, next friend and guardian ad
litem,

Plaintiff-Defendant in Error,

vs.

FILIPINO FEDERATION OF AMERICA, IN-
CORPORATED, a foreign corporation, doing
business in the Territory of Hawaii,

Defendant-Plaintiff in Error.

Writ of Error from First Circuit Court, Honor-
able J. A. Matthewman, Judge Presiding, Law
No. 16344.

WRIT OF ERROR

Territory of Hawaii:

To the Clerk of the Circuit Court of the First
Judicial Circuit, Territory of Hawaii:

Application having been made on behalf of Fili-
pino Federation of America, Incorporated, Defend-
ant-Plaintiff in Error above-named, for a Writ of
Error in the above-entitled cause, you are com-
manded forthwith to send to the Supreme Court
the record in said cause.

Witness The Honorable Samuel B. Kemp, Chief
Justice of the Supreme Court of the Territory of
Hawaii, this 27th day of October, 1948.

(Seal)

/s/ LEOTI V. KRONE,

Clerk of the Supreme Court.

[Endorsed]: Filed Oct. 27, 1948. [6]

[Title of Supreme Court and Cause.]

RETURN TO WRIT OF ERROR

To the Clerk of the Supreme Court of the Territory
of Hawaii:

The execution of the within writ of error appears
by the record hereto annexed.

Dated at Honolulu, T. H., this day
of October, 1948.

.....,
Clerk of the Circuit Court of the First Circuit.

—
[7]

[Title of Supreme Court and Cause.]

MOTION TO STRIKE AND QUASH
WRIT OF ERROR

Comes now the above-mentioned Defendant in
error in this Court and the Plaintiff in the Court
below, by Shiro Kashiwa, his attorney, appearing
specially only for the purposes of this motion, and
hereby moves to have the Writ of Error issued on
October 27, 1948, in the above-entitled cause by
this Court stricken, quashed and declared null and
void in that at the time or prior to the filing of
the application for a writ of error and at the time
or prior to the issuance of the writ of error no
bond of any nature whatsoever in any shape or
form was filed with the clerk of this Court in favor
of the movant conditioned for the payment of the

judgment entered in the Circuit Court of the First Judicial Circuit in the sum of \$9,712.70 in case of failure to sustain the writ of error, all as provided for in Section 9557 of the Revised Laws of Hawaii 1945. [9]

This motion is based upon the records of this cause and upon the affidavit of movant's attorney, Shiro Kashiwa, attached hereto and hereby made a part hereof.

Dated at Honolulu, T. H., this 28th day of October, A. D. 1948.

STANLEY NICHOLSON, a minor, by EDWARD J. NICHOLSON, next friend and guardian ad litem,

Plaintiff-Defendant in error,

By /s/ SHIRO KASHIWA,
His Attorney. [10]

AFFIDAVIT

Territory of Hawaii,
City and County of Honolulu—ss.

Shiro Kashiwa, being first duly sworn, on oath deposes and says: That he is the attorney for the movant in the motion attached hereto; that he handled the entire case from the beginning to the end in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, and knows of his own knowledge that a judgment was entered in favor of the movant and against the Filipino Federation of America in the total sum of

\$9,712.70; and that the attached certified copy of the judgment is a true and correct copy of the judgment entered in said cause in the court below aforementioned.

/s/ SHIRO KASHIWA.

Subscribed and sworn to before me this 28th day of October A. D. 1948.

(Seal) /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires August 9, 1951.

[Endorsed]: Filed Oct. 28, 1948. [11]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

L. No. 16344

STANLEY NICHOLSON, a minor, by EDWARD
J. NICHOLSON, next friend and guardian ad
litem,

Plaintiff,

vs.

FILIPINO FEDERATION OF AMERICA, IN-
CORPORATED, a foreign corporation, doing
business in the Territory of Hawaii,

Defendant.

JUDGMENT

Pursuant to the decision of the above-entitled Court rendered and filed on July 13, 1948,

It Is Hereby Ordered, Adjudged and Decreed that the Plaintiff do have and recover from the

Defendant the sum of Nine Thousand Six Hundred Twelve and 70/100 Dollars (\$9,612.70) together with the sum of \$100.00, allowed as costs to the Plaintiff, or a total of \$9,712.70.

Dated at Honolulu, T. H., July 29, 1948.

(Seal) GEORGE KAHOWAI,
Clerk, Circuit Court of First Judicial Circuit,
Territory of Hawaii.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

/s/ W. H. TILLEY,
Clerk, Circuit Court, First Circuit, Territory of
Hawaii.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office, in full force and effect this 28th day of Oct., 1948.

(Seal) /s/ W. H. TILLEY,
Clerk, Circuit Court, First Circuit, Territory of
Hawaii.

[Endorsed]: Filed July 29, 1948. [13]

[Title of Supreme Court and Cause.]

ORDER QUASHING WRIT OF ERROR

The motion of the Defendant-in-error herein to quash the writ of error issued by this Court in the above-entitled cause having been heard by this Court on the date hereof, the Defendant-in-error being represented before this Court by his attorney,

Shiro Kashiwa, and the Plaintiff-in-error being represented before this Court by its attorney, Arthur K. Trask,

It Is Hereby Ordered and Adjudged that the aforementioned motion be and is hereby granted and that the writ of error issued by this Court in the above-entitled cause be and is hereby quashed.

Dated at Honolulu, T. H., this 3rd day of November, A. D. 1948.

(Seal) /s/ S. B. KEMP,
Chief Justice of the Supreme Court of the Territory of Hawaii.

[Endorsed]: Filed Nov. 3, 1948. [15]

[Title of Supreme Court and Cause.]

PETITION FOR REHEARING

To the Honorable Supreme Court of the Territory of Hawaii:

Comes now Filipino Federation of America, Incorporated, a foreign corporation doing business in the Territory of Hawaii, Defendant-Plaintiff in Error above named, by Arthur K. Trask, its attorney, and respectfully petitions for a rehearing of said cause, and for vacation of the Order Quashing Writ of Error herein, on the following grounds:

I.

That this Honorable Court in ordering the Writ of Error quashed on the 3rd day of November, 1948, failed to consider the repealing effect of Section 4, Act 19, Session Laws of Hawaii, 1939:

“Section 4. Wherever provision is made in the Revised Laws of Hawaii 1935, as amended, for the filing of any bond or the deposit of cash in lieu of bond to cover costs on appeal to the circuit court or on writ of error, exceptions or appeal to the supreme court, such provision is hereby repealed.”

II.

That the aforesaid Section 4, Act 19, Session Laws 1939, amongst other things deleted the requirement of Section 3556, Revised Laws of Hawaii, 1935, for the filing of a bond where there is a money judgment as well as the filing of a bond for costs, which this Honorable Court construed in *Kuapuhi vs. Pa*, 31 Haw. 623, as being synonymous with a money judgment; and that Section 3556, Revised Laws of Hawaii, 1935, now appears as Section 9557, Revised Laws of Hawaii, 1945; and that in the citation thereto, there appears the aforesaid act 19, Session Laws of Hawaii, 1939.

III.

That the purpose of an appeal bond is to provide security for the adverse party; and that no other purpose is apparent; that the statute is remedial:

In re Watkins 41-A (2nd) 180, and *Clark v. Bank of Hennessey*, 14 Okl 572; *Arnold v. Brook's Estate*, 36 Vt 204.

IV.

That the policy of our law as evidenced by statutory provisions on the subject is to allow appeals from final judgments to the end that the losing party may have a review of alleged errors com-

mitted to his prejudice by the trial court; that it was the legislative intent that the ends of justice would be best subserved by having in mind this salutary purpose. “* * * and appeal being the creature of the statute, the object to be subserved being to get at the very right of the cause, statutes pertaining to procedure are entitled to a liberal construction, and courts should not be prone to plant thorns in the path of appeal.” *Stid v. Mo. Pac. Ry. Co.*, 211 Mo. 411, 418, 109 S. W. 663, 665. Furthermore, in *Hurley v. Universal Clay Co.*, 278 Mo. [18] 408, this doctrine was well expressed that the right to an appeal, though purely statutory, is remedial, and, therefore, to be liberally construed, in which case the aforesaid *Stid* case was cited. Also in accord, *Tooker v. Mo. Power and Light Company*, 80 S. W. (2d) 691.

V.

That this Honorable Court, in entering its Order quashing the Writ of Error herein, overlooked the well-established rule of statutory construction set forth in the following cases:

“Where a law is plain and unambiguous, the legislature must be intended to mean what has been plainly expressed and nothing remains to give the intent effect. The Court cannot look beyond the words used by the Legislature in construing an enactment when the meaning of the enactment is plain and intelligible.”

Castle & Cooke v. Luce, 5 Haw. 321.

“A law which is clear and unambiguous and the application of which in its literal terms results in no peculiar hardship or absurdity requires no con-

struction or interpretation, and all that the Court can do in such cases is to declare the law to be as it is without undertaking to modify its terms.”

Ex parte Higuchi, 17 Haw. 428.

“Statutes should be so construed as the plain sense of their language imports when that sense is plain, and when they are obscure and ambiguous, such a construction as will be consonant with the real intention of the lawmakers, with reason, justice, and good discretion, should be adopted * * *. Remedial statutes should receive an equitable interpretation whereby the letter of the statute is sometimes restrained and sometimes enlarged so as more effectually to meet the beneficial end in view and prevent a failure of the remedy.”

Shillaber v. Waldo, 1 Haw. 21 (31).

Wherefore, petitioner prays that a rehearing be had herein and that this Honorable Court do thereupon vacate the Order to Quash the Writ of Error on file herein.

Dated at Honolulu, T. H., this 8th day of November, 1948.

Respectfully submitted, [19]

FILIPINO FEDERATION OF AMERICA, INCORPORATED, Defendant-Plaintiff in error,

By /s/ A. K. TRASK,
Its Attorney.

CERTIFICATE

This is to certify that I, Arthur K. Trask, have examined the record and the authorities hereinabove cited, and that I am convinced that my client,

Filipino Federation of America, Incorporated, has a good and meritorious cause for suing out this Petition for Rehearing, under Rule 5 of the rules of the Supreme Court of the Territory of Hawaii, and that this rehearing is not sought for the purposes of delay.

/s/ A. K. TRASK.

[Endorsed]: Filed Nov. 9, 1948. [20]

[Title of Supreme Court and Cause.]

CERTIFICATE OF ACKNOWLEDGMENT

The undersigned hereby acknowledges receipt of a copy of the Petition for Rehearing in the above-entitled Court and cause, this 9th day of November, A. D. 1948.

Dated at Honolulu, T. H., this 9th day of November, 1948.

STANLEY NICHOLSON, a minor, by EDWARD
J. NICHOLSON, next friend and guardian ad
litem, Plaintiff-Defendant in error,
By /s/ SHIRO KASHIWA,
His Attorney.

[Endorsed]: Filed Nov. 9, 1948. [22]

[Title of Supreme Court and Cause.]

Petition for Rehearing.

Filed November 9, 1948.

Decided November 19, 1948.

Kemp, C. J., Le Baron, J., and Circuit Judge
Buck in place of Peters, J., absent.

DECISION

Per Curiam. The plaintiff in error, the defendant below, in the above-entitled matter, did not comply with the provision in section 9557, Revised Laws of Hawaii 1945, which requires that plaintiff in error, as a condition precedent to the issuance of a writ of error, file with the clerk a bond in favor of the prevailing party conditioned for the payment of the judgment in the original cause in case of failure to sustain the writ of error.

The defendant in error moved that the writ be quashed for the failure of the plaintiff in error to file the bond required by the statute. The judgment of the circuit court, which plaintiff in error sought to have reversed, is a judgment in favor of the plaintiff in a suit for damages for personal injuries suffered in an automobile accident. There was and is no claim that the judgment against the plaintiff in error is not [24] a money judgment. The motion to quash the writ was not resisted. We sustain the motion and quashed the writ.

The plaintiff in error now petitions for a rehearing of the motion to quash, and asserts that the court overlooked section 4 of Act 19 of Session Laws of Hawaii 1939, which he thinks repealed that provision in section 3556 of the Revised Laws of Hawaii 1935, which required a bond in favor of the prevailing party, conditioned for the payment of the judgment and which has been retained in the Revised Laws of Hawaii 1945 as section 9557, which reads in part as follows:

“No writ of error shall issue until the sum provided by section 9746 has been deposited to cover costs, and, except in criminal cases and cases in which there is no money judgment, a bond has been filed with the clerk, in favor of the prevailing party in the proceeding in which the error is alleged to have occurred, or his personal representatives, conditioned for the payment of the judgment in the original cause in case of failure to sustain the writ of error.”

The 1939 statute referred to amended section 3556, *supra*, but did not repeal the provision requiring a bond to pay the judgment. It did repeal a provision for the filing of a bond or the deposit of cash in lieu thereof to cover costs on writ of error, exceptions or appeal, to the supreme court. The 1939 statute did not, therefore, justify the failure to file the bond required by section 9557, *supra*.

Under the circumstances this court did not acquire jurisdiction of the cause. (W. Au Hoy v. Ching Mun Shee, 33 Haw. 239; Akana v. Espinda, 33 Haw. 314; Marks v. Waiahole Water Co., 36 Haw. 188.)

The petition is denied without argument under the rule.

A. K. Trask for the petition.

Approved:

/s/ S. B. KEMP,
Chief Justice.

/s/ LOUIS LE BARON,
Associate Justice.

/s/ CARRICK H. BUCK,
Circuit Judge.

By the Court:

(Seal) /s/ LEOTI V. KRONE,
Clerk.

[Endorsed]: Filed Nov. 19, 1948. [26]

[Title of Supreme Court and Cause.]

JUDGMENT ON DECISIONS, QUASHING
WRIT OF ERROR, AND DENYING PETI-
TION FOR REHEARING

Pursuant to the decision and opinion of the Court in the above-entitled cause, made and entered on the 10th day of November, 1948, quashing the Writ of Error issued herein on the 27th day of October, 1948, and the decision and opinion of the Court entered on the 19th day of November, 1948, denying the petition for a rehearing on the Motion to Quash the Writ of Error,

It Is Hereby Ordered and Adjudged that the Writ of Error be quashed because of the failure of plaintiff in error to file the bond required by Section 9557, Revised Laws of Hawaii 1945, and

It Is Hereby Further Ordered and Adjudged that the Petition for a Rehearing on the Motion to Quash the Writ of Error be denied.

Dated at Honolulu, T. H., this 27th day of November, 1948.

By the Court:

(Seal) /s/ LEOTI V. KRONE,
Clerk.

Approved:

/s/ S. B. KEMP,
Chief Justice.

[Endorsed]: Filed Nov. 27, 1948. [28]

[Title of Supreme Court and Cause.]

CERTIFICATE OF ACKNOWLEDGMENT

The undersigned hereby acknowledges receipt of copies of the Judgment and Notice of Judgment in the above-entitled matter.

Dated at Honolulu, T. H., this 29th day of November, 1948.

STANLEY NICHOLSON, a minor, by EDWARD J. NICHOLSON, next friend and guardian ad litem, Plaintiff, Defendant in Error,

By /s/ SHIRO KASHIWA,
His Attorney.

[Endorsed]: Filed Nov. 30, 1948. [30]

[Title of Supreme Court and Cause.]

PETITION FOR APPEAL

To The Honorable Supreme Court of the Territory of Hawaii:

Comes now Filipino Federation of America, Incorporated, a foreign corporation doing business in the Territory of Hawaii, defendant-plaintiff in error above-named and petitioner herein, and deeming itself aggrieved by the Judgment of the Supreme Court of the Territory of Hawaii, made and entered on the 27th day of November, 1948, quashing the Writ of Error heretofore issued herein, denying the petition for rehearing heretofore filed herein, for the reasons and grounds specified in the

Assignment of Errors filed herein, and do pray that this appeal may be allowed; that the Court do stay further proceedings in this cause pending the determination of the issues raised on said appeal; that the Court do set the amount of the penalty in the appeal bond, a copy of which is filed herein; and

Petitioner does further pray that a transcript of the record and proceedings, more particularly set forth in [32] the praecipe filed herein, upon which the said Judgment was made, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that said Judgment may be reversed or otherwise corrected as to the said **Circuit Court of Appeals** may by the premises seem just and equitable.

Dated at Honolulu, T. H., this 11th day of December, 1948.

FILIPINO FEDERATION OF AMERICA, INCORPORATED, a foreign corporation doing business in the Territory of Hawaii, (plaintiff-in-error) Petitioner,

By **ARTHUR K. TRASK**,

Its Attorney.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., Dec. 11th, A. D. 1948.

(Seal) /s/ **LEOTI V. KRONE**,

Clerk, Supreme Court, Territory of Hawaii.

[Endorsed]: Filed Dec. 11, 1948. [33]

[Title of Supreme Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now Filipino Federation of America, Incorporated, defendant, plaintiff in error above-named, by Arthur K. Trask, its attorney, and files the following Assignment of Errors, upon which it will rely in the prosecution of its appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment entered herein on the 27th day of November, 1948, quashing the Writ of Error heretofore issued herein, and denying the Petition for Rehearing, heretofore filed herein.

I.

That the Supreme Court of the Territory of Hawaii erred in entering Judgment quashing the writ of error heretofore issued by the above-entitled Court. Although the Order Quashing the Writ of Error does not, in terms, set forth the grounds for such Order, it must, by implication, be found that the Court based its Order on the grounds set forth in the Motion to Strike and Quash Writ of Error, filed October 28, [35] 1948, to-wit:

“* * * that at the time or prior to the filing of the application for a writ of error and at the time or prior to the issuance of the writ of error no bond of any nature whatsoever in any shape or form was filed with the clerk of this Court in favor of the movant conditioned for the payment of the judgment entered in the Circuit Court of the First Judicial Circuit in

the sum of \$9,712.70 in case of failure to sustain the writ of error, all as provided for in Section 9557 of the Revised Laws of Hawaii 1945," and

that the error of the Supreme Court of the Territory of Hawaii, as alleged in this Assignment, consists in the failure of the Supreme Court to find that the purpose of an appeal bond is to provide security for the adverse party and that the requirement of an appeal bond is not jurisdictional.

II.

That the Supreme Court of the Territory of Hawaii erred in entering judgment quashing the writ of error and denying the Petition for Rehearing because of failure to file an appeal bond prior to the issuance of the Writ of Error herein because Section 9557, Revised Laws of Hawaii 1945, is remedial legislation and compliance therewith is not a condition precedent to the prosecution of said Writ of Error.

III.

That the Supreme Court of the Territory of Hawaii erred in entering judgment quashing the writ of error and denying the Petition for Rehearing because of failure to file an appeal bond prior to the issuance of the Writ of Error herein because such actions operated to deprive the defendant, plaintiff in error, from having a review of alleged errors committed to its prejudice by the trial court.

IV.

That the Supreme Court of the Territory of Hawaii erred in entering judgment quashing the writ of error and [36] denying the petition for rehearing because of failure to file an appeal bond prior to the issuance of the Writ of Error herein because Section 9557, Revised Laws of Hawaii 1945, is a statute pertaining to procedure and should be liberally construed.

V.

That the Supreme Court of the Territory of Hawaii erred in entering judgment Quashing the Writ of Error and denying the petition for rehearing because of failure to file an appeal bond prior to the issuance of the Writ of Error herein because the requirement of an appeal bond was deleted by the legislature of the Territory of Hawaii by virtue of the enactment of Act 19, Session Laws of Hawaii 1939, Section 4 of which Act reads as follows:

“Section 4. Wherever provision is made in the Revised Laws of Hawaii 1935, as amended, for the filing of any bond or the deposit of cash in lieu of bond to cover costs on appeal to the Circuit or on writ of error exceptions or appeal to the supreme court, such provision is repealed.”

And that Section 9557, Revised Laws of Hawaii 1945, which section requires an appeal bond, is a restatement of Section 3556, Revised Laws of Hawaii 1935, is ambiguous inasmuch as the aforesaid Act 19, Session Laws of Hawaii 1939, is cited as an amendment incorporated therein.

VI.

That the Supreme Court of the Territory of Hawaii erred in entering Judgment quashing the Writ of Error and denying the Petition for Rehearing because of failure to file an appeal bond prior to the issuance of the Writ of Error herein because the effect thereof was to take property of defendant, plaintiff in error, without due process of law and without affording him an opportunity to have alleged errors committed to his prejudice in the trial court subjected to appellate review, all in violation of the Fifth and Fourteenth Amendments of the United States Constitution. [37]

VII.

That the Supreme Court of the Territory of Hawaii erred in entering judgment quashing the Writ of Error and denying the Petition for Rehearing because of failure to file an appeal bond prior to the issuance of the Writ of Error herein on the following grounds:

In construing the meaning of money judgment in Section 2529, Revised Laws of Hawaii 1925, (now Section 9557, Revised Laws of Hawaii 1945), it was held by the Supreme Court of the Territory of Hawaii in *Edward Kuapuhi, also known as E. J. Kuapuhi, and Keakaku (W) v. Catherine K. Pa and McBryde Sugar Company, Limited*, 31 Hawaii 623, that a judgment for costs is a money judgment. The Supreme Court of the Territory of Hawaii, incorporated in its *Per Curiam* denying the Petition for Rehearing, dated November 19, 1948, and

upon which Per Curiam Decision the Judgment of the Supreme Court appealed from herein is based, the following language:

“* * * The 1939 statute (meaning Act 19, Session Laws of Hawaii 1939. See Assignment V supra) referred to amended section 3556, supra, (Revised Laws of Hawaii 1935, formerly Revised Laws of Hawaii 1925, Section 2529, and now Revised Laws of Hawaii 1945, Section 9557) but did not repeal the provision requiring a bond to pay the judgment. It did repeal a provision for the filing of a bond or the deposit of cash in lieu thereof to cover costs on writ of error, exceptions or appeal, to the supreme court. The 1939 statute did not, therefore, justify the failure to file the bond required by section 9557, supra. Under the circumstances this court did not acquire jurisdiction of the cause.”

In view of the decision of the Supreme Court heretofore referred to in 31 Hawaii 623, coupled with the fact that the costs were merged in the judgment of the Circuit Court from which the Writ of Error was issued by the Supreme Court, the provision of Section 4, Act 19, Session Laws of Hawaii 1939, dispensed [38] with the filing of any bond or the deposit of cash in lieu of bond to cover costs on appeal, under the limited interpretation given said Section 4, Act 19, Session Laws of Hawaii 1939, by the Supreme Court of the Territory of Hawaii in the aforesaid Per Curiam decision; and it follows that the entirety of the Circuit Court Judgment was non separable for appellate review procedure. So, if as the Supreme

Court rules in the said Per Curiam Decision a bond is not required for costs—a judgment for costs being a money judgment—no appeal bond was necessary for the Supreme Court to acquire jurisdiction and for the issuance of the Writ of Error to bring up the Circuit Court judgment in its entirety for appellate review.

Wherefore, defendant, plaintiff in error, prays that because of the errors hereinabove assigned, the Judgment entered herein on the 27th day of November, 1948, quashing the writ of error and denying the petition for rehearing, be vacated, reversed and corrected.

Dated at Honolulu, T. H., this 11th day of December, 1948.

FILIPINO FEDERATION OF AMERICA, INCORPORATED, Defendant, Plaintiff in Error,

By /s/ ARTHUR K. TRASK,
Its Attorney.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

Dated, at Honolulu, T. H., Dec. 11th, A. D. 1948.

(Seal) /s/ LEOTI V. KRONE,
Clerk, Supreme Court, Territory of Hawaii.

[Endorsed]: Filed Dec. 11, 1948. [39]

[Title of Supreme Court and Cause.]

NOTICE OF APPEAL

To Stanley Nicholson, a minor, by Edward J. Nicholson, next friend and guardian ad litem, plaintiff-defendant in error above named, and Shiro Kashiwa, Esq., his attorney:

You and each of you are hereby notified that an appeal has been taken from the Judgment entered herein on the 27th day of November, 1948, quashing the Writ of Error heretofore issued herein, denying the Petition for a Rehearing heretofore filed herein.

Dated at Honolulu, T. H., this 11th day of December, 1948.

FILIPINO FEDERATION OF AMERICA, INCORPORATED, Defendant-Plaintiff in error,

By /s/ ARTHUR K. TRASK,
Its Attorney.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., Dec. 11, A. D. 1948.

(Seal) /s/ LEOTI V. KRONE,
Clerk, Supreme Court, Territory of Hawaii.

[Endorsed]: Filed Dec. 11, 1948. [41]

[Title of Supreme Court and Cause.]

BOND

Know All Men By These Presents, that the Filipino Federation of America, Incorporated, a foreign corporation doing business in the Territory of Hawaii, as Principal, and Pedro B. Valdez and Robert E. Cruz, both of Honolulu, City and County of Honolulu, Territory of Hawaii, as Sureties, jointly and severally are held, firmly bound, and indebted to the United States of America in the sum of Two Hundred Fifty (\$250.00) Dollars to be levied on our goods, chattels, lands and tenements, upon this condition:

Whereas, the Filipino Federation of America, Incorporated, principal, has taken an appeal, as plaintiff in error, from the Supreme Court of the Territory of Hawaii to the United States Court of Appeals for the Ninth Circuit, to reverse the judgment dated and entered in said cause on the 27th day of November, 1948, quashing the Writ of Error heretofore issued herein and denying the Petition for Rehearing, [43]

Now, Therefore, if the above bounden principal, plaintiff in error, shall prosecute its appeal without delay and answer for and pay all costs if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

In Witness Whereof, the parties hereto have

hereunto set their hands and seals this 8th day of December, A. D. 1948.

FILIPINO FEDERATION OF AMERICA, INCORPORATED, Principal,

By /s/ BENIGO O. ESCOBIDO,
Its Executive Chairman.

By /s/ ANGEL BACLAGAN,
Its Secretary.

(Seal) /s/ PEDRO B. VALDEZ,
Surety.

(Seal) /s/ ROBERT E. CRUZ,
Surety.

Territory of Hawaii,
City and County of Honolulu—ss.

And sureties in the within bond do severally solemnly swear that they have property situated within the Territory of Hawaii subject to execution and are worth in property within said Territory the amount of the penalty specified herein over and above all their debts and liabilities. [44]

/s/ PEDRO B. VALDEZ.

/s/ ROBERT E. CRUZ.

Subscribed and sworn to before me this 8th day of December, A. D. 1948.

(Seal) /s/ TAI QUAN CHING,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1949.

The foregoing bond is approved as to amount and sufficiency of sureties.

(Seal) /s/ SAMUEL B. KEMP,
Chief Justice.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., Dec. 11th, A. D. 1948.

(Seal) /s/ LEOTI V. KRONE,
Clerk, Supreme Court, Territory of Hawaii.

[Endorsed]: Filed Dec. 11, 1948. [45]

[Title of Supreme Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above-Entitled Court:

You will please prepare the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said record the following pleadings, proceedings and papers on file, to-wit:

1. Judgment in Law No. 16344 in the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

2. Writ of Error in case No. 2741 in the Supreme Court of the Territory of Hawaii.

3. Motion to Strike and Quash Writ of Error and Affidavit in case No. 2741 in the Supreme Court of the Territory of Hawaii.

4. Order Quashing Writ of Error in case No. 2741 in the Supreme Court of the Territory of Hawaii.

5. Petition for Re-Hearing in case No. 2741 in the [47] Supreme Court of the Territory of Hawaii.

6. Decision Denying Petition for Rehearing in case No. 2741 in the Supreme Court of the Territory of Hawaii.

7. Judgment in No. 2741, in the Supreme Court of the Territory of Hawaii, entered on the 27th day of November, 1948.

8. Certificate of Acknowledgment of Receipt of Judgment filed on the 30th day of November, 1948 in No. 2741, in the Supreme Court of the Territory of Hawaii.

9. Praecipe.

Said record to be prepared as required by law, and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the Clerk of the said Circuit Court of Appeals at San Francisco, in the State of California, before the period fixed by law for filing the record on appeal.

Dated at Honolulu, T. H., this 11th day of December, 1948.

FILIPINO FEDERATION OF AMERICA, INCORPORATED, Defendant-Plaintiff in Error,

By /s/ ARTHUR K. TRASK,
Its Attorney.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the

office of the Clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., Dec. 11th, A. D. 1948.

(Seal) /s/ LEOTI V. KRONE,
Clerk, Supreme Court, Territory of Hawaii.

[Endorsed]: Filed Dec. 11, 1948. [48]

[Title of Supreme Court and Cause.]

ORDER ALLOWING APPEAL

Upon filing by the Defendant-Plaintiff in error, Filipino Federation of America, Incorporated, of a bond in the sum of \$250.00, with good and sufficient sureties, the appeal in the above-entitled cause is hereby allowed.

Dated at Honolulu, T. H., this 11th day of December, 1948.

(Seal) /s/ SAMUEL B. KEMP,
Chief Justice.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., Dec. 11th, A. D. 1948.

(Seal) /s/ LEOTI V. KRONE,
Clerk, Supreme Court, Territory of Hawaii.

[Endorsed]: Filed Dec. 11, 1948. [50]

[Title of Supreme Court and Cause.]

CITATION ON APPEAL

The United States of America—ss.

The President of the United States of America
To Stanley Nicholson, minor, by Edward J. Nicholson, next friend and guardian ad litem, and to Shiro Kashiwa, his attorney:

You are hereby cited and admonished to be and appear at the Ninth Circuit, to be held at the City and County of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to an order allowing appeal, filed in the office of the Clerk of the Supreme Court of the Territory of Hawaii, wherein Filipino Federation of America, Incorporated, is the Defendant-Plaintiff in error and you are the Plaintiff-Defendant in error, to show cause, if any you have, why the Judgment in such appeal mentioned, should not be corrected and reversed, and speedy justice should not be done to the parties herein.

Witness, the Honorable Carl Vinson, Chief Justice [52] of the Supreme Court of the United States of America, this 11th day of December, 1948, and of the Independence of the United States 171st.

/s/ SAMUEL B. KEMP,
Chief Justice.

Attest:

(Seal) /s/ LEOTI V. KRONE,
Clerk of the Supreme Court of the Territory of Hawaii.

Let the within citation issue:

/s/ SAMUEL B. KEMP,
Chief Justice.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

(Seal) /s/ LEOTI V. KRONE,
Clerk, Supreme Court, Territory of Hawaii.

[Endorsed]: Filed Dec. 11, 1948. [53]

[Title of Supreme Court and Cause.]

SUPREME COURT CLERK'S CERTIFICATE

I, Leoti V. Krone, clerk of the supreme court of the Territory of Hawaii, do hereby certify that the foregoing documents, attached hereto and listed in the index herein, are full, true, and correct copies of the originals on file in the above-entitled court and cause.

I further certify that the cost of the foregoing transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit is \$51.50, and that said amount has been paid by the attorney for the appellant (plaintiff in error).

In Witness Whereof, I have hereunto set my hand and affixed the seal of the supreme court of the Territory of Hawaii at Honolulu, this 5th day of January, 1949.

/s/ LEOTI V. KRONE,
Clerk. [54]

[Endorsed]: No. 12155. United States Court of Appeals for the Ninth Circuit. Filipino Federation of America, Incorporated, Appellant, vs. Stanley Nicholson, a minor, by Edward J. Nicholson, next friend and guardian ad litem, Appellee. Transcript of Record. Appeal from the Supreme Court for the Territory of Hawaii.

Filed January 17, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the Supreme Court of the Territory of Hawaii,
October Term, 1948.

No. 12155

STANLEY NICHOLSON, a minor, by Edward J.
Nicholson, next friend and guardian ad litem,
Plaintiff-Defendant in Error,
vs.

FILIPINO FEDERATION OF AMERICA, INCORPORATED, a foreign corporation, doing business in the Territory of Hawaii,
Defendant-Plaintiff in Error.

STATEMENT OF POINTS AND
DESIGNATION OF PARTS OF RECORD

Comes now Filipino Federation of America, Incorporated, a foreign corporation, doing business in the Territory of Hawaii, appellant herein, by

his attorney, Arthur K. Trask, and in compliance with subdivision 6 of rule 19 requiring a concise statement of the points on which appellant intends to rely on the appeal, hereby adopts as the points on appeal the assignment of errors appearing in the transcript of the record, and in compliance with the rules of this court pertaining to the designation of the portion of the record to be printed, directs that the entire record on appeal, as set forth in the praecipe heretofore filed with the clerk of the supreme court of the Territory of Hawaii, with the request that copies of the record as so designated be prepared and transmitted to this court, be printed as the record on review.

Dated Honolulu, T. H., January 8, 1949.

/s/ A. K. TRASK,

Attorney for plaintiff in error-appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed January 17, 1949. Paul P. O'Brien, Clerk.

No. 12,155

IN THE

United States Court of Appeals
For the Ninth Circuit

FILIPINO FEDERATION OF AMERICA,
INCORPORATED,

Appellant,

VS.

STANLEY NICHOLSON, a minor, by Edward J. Nicholson, next friend and guardian ad litem,

Appellee.

On Appeal from the Supreme Court of the
Territory of Hawaii.

BRIEF OF APPELLANT.

ARTHUR K. TRESK,

1042 Smith Street, Honolulu 3, T. H.,

*Attorney for Filipino Federation of
America, Incorporated, Appellant.*

Subject Index

| | Page |
|--|------|
| Opinion below | 1 |
| Statement of the pleadings and the facts | 2 |
| Statement of the case | 3 |
| Specifications of assigned error | 5 |
| Argument | 6 |

I.

That the Supreme Court of the Territory of Hawaii erred in entering judgment quashing the writ of error heretofore issued by the above-entitled court. Although the order quashing the writ of error does not, in terms, set forth the grounds for such order, it must, by implication, be found that the court based its order on the grounds set forth in the motion to strike and quash writ of error, filed October 28, 1948, to-wit:

“That at the time or prior to the filing of the application for a writ of error and at the time or prior to the issuance of the writ of error no bond of any nature whatsoever in any shape or form was filed with the clerk of this court in favor of the movant conditioned for the payment of the judgment entered in the Circuit Court of the First Judicial Circuit in the sum of \$9,712.70 in case of failure to sustain the writ of error, all as provided for in Section 9557 of the Revised Laws of Hawaii 1945,” and

That the error of the Supreme Court of the Territory of Hawaii, as alleged in this assignment consists in the failure of the Supreme Court to find that the purpose of an appeal bond is to provide security for the adverse party and that the requirement of an appeal bond is not jurisdictional (pages 19-20, inclusive of Record)..... 6

II.

That the Supreme Court of the Territory of Hawaii erred in entering judgment quashing the writ of error in denying the petition for rehearing because of failure to file an appeal bond prior to the issuance of the writ of error herein

because Section 9557, Revised Laws of Hawaii 1945, is remedial legislation and compliance therewith is not a condition precedent to the prosecution of said writ of error (page 20 of Record) 6

III.

That the Supreme Court of the Territory of Hawaii erred in entering judgment quashing the writ of error and denying the petition for rehearing because of failure to file an appeal bond prior to the issuance of the writ of error herein because such actions operated to deprive the defendant, plaintiff in error, from having a review of alleged errors committed to its prejudice by the trial court (page 20 of Record) 7

IV.

That the Supreme Court of the Territory of Hawaii erred in entering judgment quashing the writ of error and denying the petition for rehearing because of failure to file an appeal bond prior to the issuance of the writ of error herein because Section 9557, Revised Laws of Hawaii 1945, is a statute pertaining to procedure and should be liberally construed (page 21 of Record) 7

V.

That the Supreme Court of the Territory of Hawaii erred in entering judgment quashing the writ of error and denying the petition for rehearing because of failure to file an appeal bond prior to the issuance of the writ of error herein because the requirement of an appeal bond was deleted by the Legislature of the Territory of Hawaii by virtue of the enactment of Act 19, Session Laws of Hawaii 1939, Section 4, of which Act reads as follows:

“Section 4. Wherever provision is made in Revised Laws of Hawaii 1935, as amended, for the filing of any bond or the deposit of cash in lieu of bond to cover costs on appeal to the Circuit or on writ of error exceptions or appeal to the Supreme Court, such provision is repealed.”

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| And that Section 9557, Revised Laws of Hawaii 1945, which section requires an appeal bond, is a restatement of Section 3556, Revised Laws of Hawaii 1935, is ambiguous inasmuch as the aforesaid Act 19, Session Laws of Hawaii 1939, is cited as an amendment incorporated therein (Record, page 21) | 18 |
|---|----|

VI.

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|--|----|
| That the Supreme Court of the Territory of Hawaii erred in entering judgment quashing the writ of error and denying the petition for rehearing because of failure to file an appeal bond prior to the issuance of the writ of error herein because the effect thereof was to take property of defendant, plaintiff in error, without due process of law and without affording him an opportunity to have alleged errors committed to his prejudice in the trial court subjected to appellate review, all in violation of the Fifth and Fourteenth Amendments of the United States Constitution (Record, page 22) | 25 |
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VII.

That the Supreme Court of the Territory of Hawaii erred in entering judgment quashing the writ of error and denying the petition for rehearing because of failure to file an appeal bond prior to the issuance of the writ of error herein on the following grounds:

In construing the meaning of money judgment in Section 2529, Revised Laws of Hawaii 1925 (now Section 9557, Revised Laws of Hawaii 1945), it was held by the Supreme Court of the Territory of Hawaii in Edward Kuapuhi, also known as E. J. Kuapuhi, and Keakaku (#) V. Catherine K. Pa and McBryde Sugar Company, Limited, 31 Hawaii 623, that a judgment for costs is a money judgment. The Supreme Court of the Territory of Hawaii, incorporated in its per curiam denying the petition for rehearing, dated November 19, 1948, and upon which per curiam decision the judgment of the Supreme Court appealed from herein is based, the following language:

“* * * The 1939 Statute (meaning Act 19, Session Laws of Hawaii 1939. See Assignment V, supra) referred to

amended Section 3556, *supra* (Revised Laws of Hawaii 1935, formerly Revised Laws of Hawaii 1925, Section 2529, and now Revised Laws of Hawaii 1945, Section 9557), but did not repeal the provision requiring a bond to pay the judgment. It did repeal a provision for the filing of a bond or the deposit of cash in lieu thereof to cover costs on writ of error, exceptions or appeal, to the Supreme Court. The 1939 Statute did not, therefore, justify the failure to file the bond required by Section 9557, *supra*. Under the circumstances this court did not acquire jurisdiction of the cause."

In view of the decision of the Supreme Court heretofore referred to in 31 Hawaii 623, coupled with the fact that the costs were merged in the judgment of the Circuit Court from which the writ of error was issued by the Supreme Court, the provisions of Section 4, Act 19, Session Laws of Hawaii 1939, dispensed with the filing of any bond or the deposit of cash in lieu of bond to cover costs on appeal, under the limited interpretation given said Section 4, Act 19, Session Laws of Hawaii 1939, by the Supreme Court of the Territory of Hawaii in the aforesaid *per curiam* decision; and it follows that the entirety of the Circuit Court judgment was non separable for appellate review procedure. So, if as the Supreme Court Rules in the said *per curiam* decision a bond is not required for costs—a judgment for costs being a money judgment—no appeal bond was necessary for the Supreme Court to acquire jurisdiction and for the issuance of the writ of error to bring up the Circuit Court judgment in its entirety for appellate review (Record, pages 22-24).....

26

Conclusion

29

Table of Authorities Cited

| Cases | Pages |
|---|--------------|
| Akana v. Espinda, 33 Haw. 314 | 15 |
| District of Columbia v. Hutton, 143 U. S. 18, 36 L. Ed. 60, 12 Sup. Ct. 369 | 21 |
| Estabrook v. Royon, 52 Ohio St. 318, 39 N. E. 808, 32 L.R.A. 805 | 22 |
| Holloway v. Brown, 14 Haw. 170 | 10 |
| Hilo Finance v. De Costa, 34 Haw. 47 | 16 |
| In re Okkots, 9 Haw. 402 | 24 |
| Kuapuhi v. Pa, 31 Haw. 623 | 27 |
| Marks v. Waiahole Water Co., 36 Haw. 188 (1942)..... | 16, 17 |
| R. W. Meyer, Ltd. v. McGuire, 36 Haw. 184 | 17 |
| Republic of Hawaii v. Edwards, 12 Haw. 55 | 24 |
| Territory v. L. I. S. N. Co., 33 Haw. 890..... | 15, 16 |
| The King v. Yung Hong, 7 Haw. 359 | 24 |
| Tooker v. Missouri Power & Light Company, 336 Mo. 592, 80 S. W. (2d) 691, 101 A.L.R. 365 | 7, 9 |
| U. S. v. Gillis, 95 U. S. 407, 24 L. Ed. 503 | 21 |
| W. Au Hoy v. Ching Mun Shee, 33 Haw. 239 | 15, 17 |
| Wahiawa Sugar Co. v. Waialua Agricultural Co., 13 Haw. 109 | 24 |
| Whitby v. Mots, 125 Minn. 40, 145 N. W. 623, 51 L.R.A. (N.S.) 645 | 22 |

Statutes

| | |
|---|--------|
| Judicial Code, Section 128A | 2 |
| Organic Act, Section 81, Chapter IV | 13 |
| Revised Laws of Hawaii 1925, Section 2529 | 15, 27 |

| | Pages |
|---|---|
| Revised Laws of Hawaii 1935, Section 3556 . . . | 4, 15, 16, 18, 19, 20 |
| Revised Laws of Hawaii 1945: | |
| Section 9551, Chapter 186 | 9, 10, 17 |
| Sections 9551 to 9664, Chapter 186 | 9, 12 |
| Section 9555, Chapter 186 | 14, 17 |
| Section 9557 | 3, 4, 9, 12, 13, 14, 15, 16, 17, 19, 20, 21, 24, 27 |
| Session Laws of Hawaii 1892, pages 272, 275 | 10 |
| Session Laws of Hawaii 1939: | |
| Act 19 | 4, 19, 20, 21, 22, 23, 28 |
| Session Laws of Hawaii 1945: | |
| Section 6, Act 1 | 24 |
| 28 U.S.C.A., Sec. 225 | 2 |

Texts

| | |
|--|----|
| 2 Am. Jur., Appeal and Error, Section 7 | 9 |
| 2 Am. Jur., Appeal and Error, Section 12 | 13 |
| 50 Am. Jur., Statutes, Section 38 | 21 |
| 50 Am. Jur., Statutes, Section 230 | 22 |
| 50 Am. Jur., Statutes, Section 281 | 23 |
| 50 Am. Jur., Statutes, Section 337 | 21 |
| 50 Am. Jur., Statutes, Section 372 | 23 |
| 50 Am. Jur., Statutes, Section 386 | 11 |
| 50 Am. Jur., Statutes, Section 392 | 11 |
| 3 Corpus Juris 319 | 12 |

No. 12,155

IN THE
United States Court of Appeals
For the Ninth Circuit

FILIPINO FEDERATION OF AMERICA,
INCORPORATED,

Appellant,

vs.

STANLEY NICHOLSON, a minor, by Edward J. Nicholson, next friend and guardian ad litem,

Appellee.

On Appeal from the Supreme Court of the
Territory of Hawaii.

BRIEF OF APPELLANT.

OPINION BELOW.

The judgment of the Supreme Court of the Territory of Hawaii was filed on November 27, 1948, pursuant to the decision and opinion of the said Court made and entered on the 10th day of November, 1948, quashing the writ of error and the decision and opinion on petition for rehearing rendered and filed on the 19th day of November, 1948. (Rec. pp. 7-16.)

STATEMENT OF THE PLEADINGS AND THE FACTS.

This cause has come to this Court upon the appeal of the appellant, Filipino Federation of America, Incorporated, from the judgment of the Supreme Court of the Territory of Hawaii entered November 27, 1948.

The appellant invokes the jurisdiction of this Court under Section 128A of the Judicial Code as amended by Act of February 13, 1925. (28 U.S.C.A. Sec. 225.)

In the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, on the 29th day of July, 1948, a judgment was made and entered for the appellee herein, and against the appellant, for the sum of Nine Thousand Six Hundred Twelve and 70/100 Dollars (\$9612.70) together with the sum of \$100.00; allowed as cost to the appellee, or a total of \$9712.70. (Rec. p. 2); thereafter, within the time prescribed by law appellant applied for and a writ of error was issued on the 27th day of October, 1948, by the Supreme Court of the Territory of Hawaii. (Rec. p. 3.)

In the Supreme Court of the Territory of Hawaii, the appellee filed a motion to strike and quash the said writ of error upon the grounds therein stated. (Rec. pp. 4-5.)

The Supreme Court sustained the motion to strike and quash and by written order dated November 3, 1948 quashed the said writ of error. (Rec. pp. 7-8.)

On November 8, 1949, the appellant filed its petition for rehearing and for vacation of the order quashing writ of error. (Rec. pp. 8-11.)

The Supreme Court of the Territory of Hawaii, by its judgment, made, entered and filed on November 27,

1948, pursuant to the decision and opinion of the said Court, made and entered on the 10th day of November, 1948, quashing the writ of error and the decision and opinion on petition for rehearing rendered and filed on the 19th day of November, 1948, denied the petition for a rehearing on the motion to quash the writ of error. Within the time prescribed by law, appellant filed his petition for appeal to this Court and assignment of errors, which petition was duly allowed and which appeal has been perfected to this Court.

STATEMENT OF THE CASE.

There was a judgment in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, for the appellee and against the appellants herein in the sum of \$9712.70, that sum including \$100.00 as costs assessed against said appellant. (Rec. p. 2.)

Thereafter, within the time allowed by law, appellant applied for a writ of error, which writ of error was issued by the Supreme Court of the Territory of Hawaii on October 27, 1948. (Rec. p. 3.)

On October 28, 1948, appellee herein filed his motion to strike and quash the writ of error (Rec. pp. 4-5), on the ground that appellant had, at the time or prior to the issuance of the writ of error, failed to comply with the provisions of Section 9557, Revised Laws of Hawaii, 1945. (Rec. pp. 4-5.)

Upon a hearing on the motion to quash the writ of error, the said Supreme Court made its order quashing

the writ of error heretofore issued to the appellant. (Rec. pp. 7-8.)

On November 9, 1948, appellant submitted and filed in the Supreme Court of Hawaii a petition for rehearing, alleging that the order of the Supreme Court quashing the writ of error should be vacated, on the following grounds:

1. That the Supreme Court failed to consider that Section 4, Act 19, of Sessions Laws of Hawaii, 1939, deleted the requirement of Section 3556, Revised Laws of Hawaii, 1935 (Section 9557, Revised Laws of Hawaii, 1945) for the filing of a bond where there is a money judgment, as well as the filing of a bond for costs. (Rec. pp. 8-9.)

2. That the sole apparent purpose of an appeal bond is to provide security for the adverse party. (Rec. p. 9.)

3. That Section 9557, Revised Laws of Hawaii, 1945, is a remedial statute relating to procedure and, therefore, should be liberally construed. (Rec. pp. 9-10.)

4. That remedial statutes should receive an equitable interpretation so as more effectually to meet the beneficial end in view and prevent a failure of the remedy. (Rec. p. 11.)

The Supreme Court of Hawaii on November 19, 1948, by its per curiam decision, denied the petition for rehearing on this ground: That

“The 1939 statute referred to amended section 3556, *supra*, but did not repeal the provision

requiring a bond to pay the judgment. It did repeal a provision for the filing of a bond or the deposit of cash in lieu thereof to cover costs on writ of error, exceptions or appeal, to the supreme court. The 1939 statute did not, therefore, justify the failure to file the bond required by section 9557, *supra*. Under the circumstances this court did not acquire jurisdiction of the cause." (Rec. pp. 14-15.)

On December 11, 1948, appellant herein filed its petition for appeal, for the reasons and grounds specified in the assignment of errors as set forth in the record (Rec. pp. 17-18), and on the said date, an order allowing appeal was signed by the Chief Justice of the Supreme Court of Hawaii. (Rec. p. 30.)

SPECIFICATIONS OF ASSIGNED ERROR.

The appellant relies upon assignments of error numbered I, II, III, IV, V and VII, as set forth in the assignment of errors herein appearing on pages 19 to 24 of the record. At this time, with the consent of this Honorable Court, appellant wishes to waive argument on Assignment of Error VI, contained on page 22 of the record.

ARGUMENT.**I.**

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING JUDGMENT QUASHING THE WRIT OF ERROR HERETOFORE ISSUED BY THE ABOVE-ENTITLED COURT. ALTHOUGH THE ORDER QUASHING THE WRIT OF ERROR DOES NOT, IN TERMS, SET FORTH THE GROUNDS FOR SUCH ORDER, IT MUST, BY IMPLICATION, BE FOUND THAT THE COURT BASED ITS ORDER ON THE GROUNDS SET FORTH IN THE MOTION TO STRIKE AND QUASH WRIT OF ERROR, FILED OCTOBER 28, 1948, TO-WIT:

“THAT AT THE TIME OR PRIOR TO THE FILING OF THE APPLICATION FOR A WRIT OF ERROR AND AT THE TIME OR PRIOR TO THE ISSUANCE OF THE WRIT OF ERROR NO BOND OF ANY NATURE WHATSOEVER IN ANY SHAPE OR FORM WAS FILED WITH THE CLERK OF THIS COURT IN FAVOR OF THE MOVANT CONDITIONED FOR THE PAYMENT OF THE JUDGMENT ENTERED IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN THE SUM OF \$9,712.70 IN CASE OF FAILURE TO SUSTAIN THE WRIT OF ERROR, ALL AS PROVIDED FOR IN SECTION 9557 OF THE REVISED LAWS OF HAWAII 1945,” AND

THAT THE ERROR OF THE SUPREME COURT OF THE TERRITORY OF HAWAII, AS ALLEGED IN THIS ASSIGNMENT CONSISTS IN THE FAILURE OF THE SUPREME COURT TO FIND THAT THE PURPOSE OF AN APPEAL BOND IS TO PROVIDE SECURITY FOR THE ADVERSE PARTY AND THAT THE REQUIREMENT OF AN APPEAL BOND IS NOT JURISDICTIONAL. (Pages 19-20, inclusive, of Record.)

II.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING JUDGMENT QUASHING THE WRIT OF ERROR IN DENYING THE PETITION FOR REHEARING BECAUSE OF FAILURE TO FILE AN APPEAL BOND PRIOR TO THE ISSUANCE OF THE WRIT OF ERROR HEREIN BECAUSE SECTION 9557, REVISED LAWS OF HAWAII 1945, IS REMEDIAL LEGISLATION AND COMPLIANCE THEREWITH IS NOT A CONDITION PRECEDENT TO THE PROSECUTION OF SAID WRIT OF ERROR. (Page 20 of Record.)

III.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING JUDGMENT QUASHING THE WRIT OF ERROR AND DENYING THE PETITION FOR REHEARING BECAUSE OF FAILURE TO FILE AN APPEAL BOND PRIOR TO THE ISSUANCE OF THE WRIT OF ERROR HEREIN BECAUSE SUCH ACTIONS OPERATED TO DEPRIVE THE DEFENDANT, PLAINTIFF IN ERROR, FROM HAVING A REVIEW OF ALLEGED ERRORS COMMITTED TO ITS PREJUDICE BY THE TRIAL COURT. (Page 20 of Record.)

IV.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING JUDGMENT QUASHING THE WRIT OF ERROR AND DENYING THE PETITION FOR REHEARING BECAUSE OF FAILURE TO FILE AN APPEAL BOND PRIOR TO THE ISSUANCE OF THE WRIT OF ERROR HEREIN BECAUSE SECTION 9557, REVISED LAWS OF HAWAII 1945, IS A STATUTE PERTAINING TO PROCEDURE AND SHOULD BE LIBERALLY CONSTRUED. (Page 21 of Record.)

Inasmuch as Assignments of Error I, II, III and IV involve substantially the same issues of law, they will be combined for the purpose of argument.

A.

Appellant herein maintains that the purpose of an appeal bond is solely to provide security for the adverse party during the pendency of the appeal and is designed and should operate only as a stay of execution. The case of *Tooker v. Missouri Power & Light Company*, 336 Mo. 592, 80 S. W. (2d) 691, 101 A.L.R. 365, emphatically sets forth the contention of appellant. In that case the defendant failed to file an appeal bond, as required by a Missouri statute, substantially the same as the Hawaii statute in question.

The Court, in overruling the motion of the plaintiff to dismiss the appeal for the above failure, stated:

“It is the policy of the law, as evidenced by statutory provisions on the subject, to allow appeals from final judgments to the end that the losing party may have a review of alleged errors committed to his prejudice by the trial court. It is evidently the legislative belief that the ends of justice are thus best subserved. The right of appeal is statutory, but, no doubt having in mind this salutary legislative purpose, this court said, in *Stid v. Mo. Pac. Ry. Co.*, 211 Mo. 411, 418; 109 S. W. 663, 665, that ‘an appeal being the creature of the statute, the object to be subserved being to get at the very right of the cause, statutes pertaining to procedure are entitled to a liberal construction, and courts should not be prone to plant thorns in the path of appeal.’ That was said in holding that a judgment might be treated as final for the purpose of an appeal, though a motion in arrest of judgment had not been passed upon. In *Hurley v. Universal Clay Co.*, 278 Mo. 408, 415; 213 S. W. 28, it is said that the right to an appeal, though purely statutory, is remedial and therefore to be liberally construed, citing the *Stid Case*.”

On the basis of the preceding authority, appellant asserts, in accordance with a liberal and just viewpoint, that it should be entitled to a review of its case on the merits; that for the mere failure to file the statutory appeal bond allegedly required in Section 9557, Revised Laws of Hawaii, 1945, appellee had ample protection in that execution could then imme-

diately issue against appellant. To hold otherwise would be, to restate a portion of the case of *Tooker v. Missouri Power & Light Company*, quoted above, "planting thorns in the path of appeal".

B.

Section 9557, Revised Laws of Hawaii, 1945, is remedial legislation and should be liberally construed. As stated in 2 American Jurisprudence, Appeal and Error, Section 7:

"Statutes giving and regulating the right of appeal are recognized as remedial in their nature and should receive a liberal construction in furtherance of the right of appeal."

Chapter 186, Revised Laws of Hawaii, 1945, Sections 9551 to 9664, inclusive, which governs the issuance of writs of error is clearly a chapter giving and regulating the right of appeal, and thus remedial in its nature.

Section 9551 of Chapter 186, Revised Laws of Hawaii, 1945, states:

"A writ of error, returnable to the supreme court, may be issued by the clerk, or any deputy clerk or assistant clerk of the supreme court, upon the application of any party deeming himself aggrieved by the judgment of a circuit court, the land court, or a district magistrate, or by the order or decree of a circuit judge at chambers, at any time before execution thereon is fully satisfied, within ninety days from the entry of which judgment, order or decree and the sentence of the court in a criminal case shall be the judgment."

Section 9551 is substantially the same and is derived from "An Act to define writs of error" (Session Laws, 1892, pp. 272, 275), approved and enacted into law by the legislature of the Kingdom of Hawaii in January, 1893, and reading as follows:

"Section 1 A writ of error may be had by any party deeming himself aggrieved by the decision of any Justice, Judge or Magistrate, or by the verdict of a jury, at any time before execution thereon is fully satisfied, within six months from the rendition of judgment.

Section 3 A writ of error may be had to correct any error appearing on the record, either of law or fact, or for any cause which might be assigned as error at common law; provided, however, that no writ of error shall issue for any defect of form merely in any declaration, nor for any matter held for the benefit of the plaintiff in error."

As early as 1902, in the case of *Holloway v. Brown*, 14 Haw. 170, it was recognized and affirmed, and it has never been denied to this date, that a writ of error is a form of appeal. The Court stated therein, referring to the legislation of 1893:

"* * * The writ authorized by this statute is broader than the common law writ of error and seems to cover all cases, except as otherwise provided in the statute, that might be brought up for review by appeal or exceptions and to be a concurrent method, with appeal and exceptions, for presenting causes to this court."

And again:

“The writ has issued from this Court to review alleged errors in a decree in equity (*Vierra v. Hackfeld*, 8 Haw. 436); to review proceedings in Probate in the Circuit Court (*Phelps v. Carter*, 9 Haw. 638); the decision of a district magistrate (*Lee Yau, et al. v. The Republic*, 11 Haw. 143); the decision of a Circuit Judge (*V. S. & T. Co. v. Hayashi*, 13 Haw. 695); the verdict of a jury rendered in the Circuit Court (*Pringle v. H. M. Co.*, *Id.* 705).”

Inasmuch as a writ of error is a form of appeal, it is remedial and should be liberally construed.

As stated in 50 *American Jurisprudence*, Statutes, Section 392:

“It is a general rule of law that statutes which are remedial in nature are entitled to a liberal construction, in favor of the remedy provided by law, or in favor of those entitled to the benefits of the statute * * * The rule also applies to statutes having for their design the simplification of procedure and the removal of technicalities in connection therewith.”

And again, in

50 *American Jurisprudence*, Statutes, Section 386:

“A statute entitled to a liberal construction should be fairly or favorably construed, so as to give it, if possible, a beneficial operation, and one which would tend to promote and effectuate justice, in the interest of the public good, and avoid harsh or incongruous results. The Courts should give, not stintedly or niggardly, but freely and generously, all the statute purports to give.”

3 *Corpus Juris* 319 states:

“As a general rule a statute or constitutional provision conferring, extending, or regulating the right of appeal ought not to be abridged by strict construction; but on the contrary, being remedial, it should be liberally construed, and especially, when the constitution guarantees the right of appeal, a statute regulating the exercise of the right should be so interpreted as most certainly and effectually to attain this object. A statute will not be construed as taking away the right of appeal unless the language used clearly shows such an intent.”

In summarizing this argument, appellant concludes that Chapter 186, Revised Laws of Hawaii 1945, Sections 9551 to 9664, inclusive, governing writs of error, is a chapter giving and regulating the right of appeal and that Chapter 186, which includes Section 9557, is therefore remedial legislation and should receive a liberal construction.

The effect of the decision of the Supreme Court of Hawaii in its strict holding that the appellant herein failed to comply with the provisions of Section 9557, Revised Laws of Hawaii, 1945, and thereby was not entitled to a hearing on its writ of error, is to penalize appellant and create a forfeiture, all of which is contrary to the liberal spirit of remedial legislation.

C.

The view expressed by the Supreme Court of Hawaii with respect to the case now on appeal in this Court is that the provisions of Section 9557, Revised

Laws of Hawaii, 1945, are jurisdictional and not procedural. Appellant denies the correctness of this conclusion and maintains that Section 9557 is solely a procedural statute, and as such should be liberally construed.

In order to determine whether or not Section 9557, Revised Laws of Hawaii, 1945, is jurisdictional or procedural, it must first be determined where the Courts acquire jurisdiction. The following statement appears in 2 American Jurisprudence, Appeal and Error, Section 12:

“The extent of appellate jurisdiction is controlled by the Constitution and statutes creating the court whose jurisdiction is in question, and these must be consulted on the question.”

Section 81 of Chapter IV of the Organic Act, providing a Government for the Territory of Hawaii, states with respect to the judiciary branch:

“Sec. 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided.”

Thus, the Organic Act is in the nature of a constitution to the territorial legislature, but it confers on the legislature the power to organize the courts and fix their jurisdiction.

The legislature of Hawaii definitely granted jurisdiction to the Supreme Court of Hawaii with respect to the hearing of writs of error by virtue of the following statutes, Revised Laws of Hawaii, 1945:

“Sec. 9551. A writ of error, returnable to the supreme court, may be issued by the clerk, or any deputy clerk or assistant clerk of the supreme court, upon the application of any party deeming himself aggrieved by the judgment of a circuit court, the land court, or a district magistrate, or by the order or decree of a circuit judge at chambers, at any time before execution thereon is fully satisfied, within ninety days from the entry of which judgment, order or decree and the sentence of the court in a criminal case shall be the judgment.

Sec. 9555. *A writ of error may be had as of right in term time or in vacation upon the application of a defendant in a criminal case or of any party in a civil case, or of any legal or personal representative of a deceased party in a civil case.*”
(Emphasis supplied.)

Inasmuch as the Legislature of Hawaii did not record its intent with respect to the applicability of Section 9557, an examination of the cases in which this statute is involved, must be conducted. A review of the cases is revealing. It is noted that, in spite of the express jurisdictional grantings of Sections 9551 and 9555, with respect to Chapter 186, Revised Laws of Hawaii, 1945, the Supreme Court of Hawaii has nevertheless wavered and been indecisive on the question of whether Section 9557 is a jurisdictional or a procedural statute.

In the case of *W. Au Hoy v. Ching Mun Shee*, 33 Haw. 239, the plaintiff did not comply with Section 2529 Revised Laws of Hawaii, 1925 (Section 9557, Revised Laws of Hawaii, 1945), in failing to file the required bond within the specified period. The Court refused to consider the writ of error, claiming lack of jurisdiction. However, there was a vigorous dissent from the majority view, expressing in strong and forceful language that the literal construction of the statute by the majority was entirely contrary to its purpose and spirit.

The case of *Akana v. Espinda*, 33 Haw. 314, was a per curiam opinion, based on and following the authority of the *W. Au Hoy v. Ching Mun Shee* case.

In the case of *Territory v. L. I. S. N. Co.*, 33 Haw. 890, the defendant did not, prior to the issuance of the writ of error, comply with the provisions of Section 3556, Revised Laws of Hawaii, 1935, (Section 9557, Revised Laws of Hawaii, 1945). The Court reached the conclusion *that the statutory bond was a procedural and not a jurisdictional matter* and hence could be waived. An appropriate portion of the opinion is stated:

“Prior to the argument of the case on its merits doubt was expressed by a member of the court as to whether the giving of a statutory bond was necessary to the jurisdiction of the court and therefore could not be waived by consent of the parties. The court requested briefs on this question. Counsel for the defendant in error asked to be excused from filing a brief on the ground that it might be inconsistent with the stipulation of

his client. Thereupon the court appointed Mr. Carl Wendell Carlsmith, a member of the bar, as amicus curiae to render to the court the required service. Elaborate and able briefs were accordingly filed by council for plaintiff in error and by the amicus curiae. After careful study of the question the court reached the conclusion that the statutory bond was a procedural and not a jurisdictional matter and hence could be waived. The case is therefore considered on its merits."

Hilo Finance v. De Costa, 34 Haw. 47, quoted with approval and followed the case of *Territory v. L. I. S. N. Co.*, in holding that the filing of a bond as provided by Section 3556, Revised Laws of Hawaii, 1935, (Section 9557, Revised Laws of Hawaii, 1945), as a condition precedent to the issuance of a writ of error is not a jurisdictional requirement but merely procedural and may be waived.

In the case of *Marks v. Waiahole Water Co.*, 36 Haw. 188, decided on June 27, 1942, the Court stated:

"In that there was a failure to file the required bond, the writ did not validly issue and neither the court, nor any justice, has the power or authority to ratify its improper issuance or to waive the express requirements of the statute in respect to filing a bond."

However, in this case there was again a strong dissenting opinion rebelling against such a strict and literal construction of Section 9557. The closing paragraph of the dissent states:

"The motion to dismiss should be denied with the idea of bringing about, along with security for

the defendant in error, a full and fair opportunity for the plaintiffs in error to have this court review the alleged errors of the trial court. The lawmaking body by its distinctly remedial legislation, so intended."

The case of *R. W. Meyer, Ltd. v. McGuire*, 36 Haw. 184, decided on *July 6, 1942*, involved the motion of the defendant in error to dismiss the writ of error issued on behalf of the plaintiff in error. An appropriate portion of the opinion of the Court is hereby quoted:

"Of the *procedural* grounds of the motion one is that the bond filed by plaintiff in error pursuant to the provisions of Revised Laws of Hawaii, 1935, Section 3556, was prematurely filed." (Emphasis supplied.)

In view of the provisions of Sections 9551 and 9555, Revised Laws of Hawaii, 1945, in view of the fact that in the cases of *W. Au Hoy v. Ching Mun Shee*, 33 Haw. 239, and *Marks v. Waiahole Water Co.*, 36 Haw. 188, which held that the requirements of Section 9557 were jurisdictional, there were strong dissenting opinions, and in view of the fact that in *R. W. Meyer, Ltd. v. McGuire*, 36 Haw. 184, the most recent controlling case in point of time, the Supreme Court of Hawaii indicated that Section 9557 was procedural, appellant submits in summary that Section 9557, Revised Laws of Hawaii, 1945, is procedural and as such should be liberally construed and not made a condition precedent to the issuance of a writ of error.

V.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING JUDGMENT QUASHING THE WRIT OF ERROR AND DENYING THE PETITION FOR REHEARING BECAUSE OF FAILURE TO FILE AN APPEAL BOND PRIOR TO THE ISSUANCE OF THE WRIT OF ERROR HEREIN BECAUSE THE REQUIREMENT OF AN APPEAL BOND WAS DELETED BY THE LEGISLATURE OF THE TERRITORY OF HAWAII BY VIRTUE OF THE ENACTMENT OF ACT 19, SESSION LAWS OF HAWAII 1939, SECTION 4, OF WHICH ACT READS AS FOLLOWS:

“SECTION 4. WHEREVER PROVISION IS MADE IN REVISED LAWS OF HAWAII 1935, AS AMENDED, FOR THE FILING OF ANY BOND OR THE DEPOSIT OF CASH IN LIEU OF BOND TO COVER COSTS ON APPEAL TO THE CIRCUIT OR ON WRIT OF ERROR EXCEPTIONS OR APPEAL TO THE SUPREME COURT, SUCH PROVISION IS REPEALED.”

AND THAT SECTION 9557, REVISED LAWS OF HAWAII 1945, WHICH SECTION REQUIRES AN APPEAL BOND, IS A RESTATEMENT OF SECTION 3556, REVISED LAWS OF HAWAII 1935, IS AMBIGUOUS INASMUCH AS THE AFORESAID ACT 19, SESSION LAWS OF HAWAII 1939, IS CITED AS AN AMENDMENT INCORPORATED THEREIN. (Record, page 21.)

Section 3556, Revised Laws of Hawaii 1935, required the filing of an appeal bond, to-wit:

“Section 3556. *Costs, bond.* No writ of error shall issue until the sum of twenty-five dollars has been deposited to cover costs, and, except in criminal cases and cases in which there is no money judgment, a bond has been filed with the clerk, in favor of the prevailing party in the proceeding in which the error is alleged to have occurred, or his personal representatives, conditioned for the payment of the judgment in the original cause in case of failure to sustain the writ of error.

“The Supreme Court shall have power to order additional bond upon motion, and to determine the amount of the penalty thereof and the sufficiency of the sureties to the same, or to the bond given before proceeding to a hearing on the writ.”

This requirement of filing an appeal bond was eliminated and deleted by the enactment of Act 19, Session Laws of Hawaii 1939, Section 4 of which Act reads as follows:

“Section 4. Wherever provision is made in the Revised Laws of Hawaii 1935, as amended, for the filing of any bond or the deposit of cash in lieu of bond to cover costs on appeal to the Circuit Court or on writ of error, exceptions or appeal to the Supreme Court, such provision is repealed.”

Section 9557, Revised Laws of Hawaii 1945, which section requires an appeal bond, is a restatement of Section 3556, Revised Laws of Hawaii, cited *supra*, and reads as follows:

“Section 9557. *Costs, bonds.* No writ of error shall issue until the sum provided by section 9746 has been deposited to cover costs, and, except in criminal cases and cases in which there is no money judgment, a bond has been filed with the clerk, in favor of the prevailing party in the proceeding in which the error is alleged to have occurred, or his personal representatives, conditioned for the payment of the judgment in the original cause in case of failure to sustain the writ of error.

“The Supreme Court shall have power to order additional bond upon motion, and to determine the

amount of the penalty thereof and the sufficiency of the sureties to the same, or to the bond given before proceeding to a hearing on the writ. (L. 1892, c. 95, pt. of s. 8, s. 15; am. L. 1919, c. 44, s. 6; R.L. 1925, s. 2529; *R. L. 1935, s. 3556; am. L. 1939, c. 19, s. 4.*)” (Emphasis supplied.)

It is pointed out that Section 9557, Revised Laws of Hawaii 1945, which requires an appeal bond, is a restatement of Section 3556, Revised Laws of Hawaii 1935, and is ambiguous and obscure, inasmuch as the aforesaid Act 19, Session Laws of Hawaii 1939, is cited as an amendment incorporated therein, and because of the reason that the said Section 3556 unequivocally makes unnecessary the filing of an appeal bond.

What is the effect of Act 19, Session Laws of Hawaii, 1939? It absolutely makes unnecessary the filing of *any bond* on appeal to the Circuit Court or on writ of error, exceptions or appeal to the Supreme Court. Now what is the effect of Section 9557, Revised Laws of Hawaii, 1945? A close examination of that section will show that it apparently makes necessary a filing of a bond in favor of the prevailing party before a writ of error is to be issued. However, Section 9557, cited *supra*, has this additional feature: that in it there is cited Revised Laws, 1935, Section 3556, and next thereto, Act 19, Section 4, Session Laws of Hawaii, is cited as an amendment incorporated therein.

Obviously, then, Section 9557, Revised Laws of Hawaii, 1945, is highly ambiguous and obscure.

It is to be noted that Act 19 of the 1939 Session Laws, which makes unnecessary the filing of any bond on appeal, in time, was an earlier statute, than Section 9557, of the Revised Laws of 1945. It is said in 50 *American Jurisprudence*, Statutes, Section 38:

“The adoption of an earlier statute by reference makes it as much a part of the later act as though it had been incorporated at full length.”

Furthermore, it is stated that,

“In any event, a later statute not declaratory in its terms may not be relied upon for the purpose of giving a construction to an earlier act plain in its terms. Where the legislative body has expressly legislated in respect to a given matter, that express legislation must control, in the absence of subsequent legislation equally express; it is not overthrown by any mere inferences or implications to be found in such subsequent legislation.”

50 *American Jurisprudence*, Statutes, Section 337.

See also,

U. S. v. Gillis, 95 U.S. 407, 24 L. Ed. 503;

District of Columbia v. Hutton, 143 U.S. 18, 36 L. Ed. 60, 12 Sup. Ct. 369.

Act 19, Session Laws of Hawaii, 1939, states that:

“Wherever provision is made in the Revised Laws of Hawaii 1935, as amended, for the *filing of any*

bond or the deposit of cash in lieu of bond to cover costs on appeal to the circuit court or on writ of error, exceptions or appeal to the supreme court, such provision is repealed.” (Emphasis supplied.)

The aforesaid section makes unnecessary the filing of any bond on appeals.

“In the construction of a statute, the general rule is that the Court may write no limitations therein. As variously expressed, the statute may not be restricted, constricted, qualified, narrowed, or abridged.”

50 *American Jurisprudence*, Statutes, Section 230.

In *Estabrook v. Royon*, 52 Ohio St. 318, 39 N.E. 808, 32 L.R.A. 805, it was held that, where a word is employed in a statute without qualification, it is to be understood in its integral, *and not in a partial or negative sense*.

Whitby v. Mots, 125 Minn. 40, 145 N.W. 623, 51 L.R.A. (NS) 645, holds that the Courts cannot interpolate restrictive words in a statute when there is naught to indicate an intention of the legislature so to limit its operation. In view of these authorities, it must be reasonable to hold that the term “any bond” as cited *supra*, was not restrictive or to be construed narrowly.

Furthermore, inasmuch as the aforesaid Act 19, Session Laws of 1939, Section 4, reads as follows, in part:

“* * * any bond or the deposit of cash in lieu of bond to cover costs * * *.”

the deletion of a requirement of a bond on appeal applies either to any bond or the deposit of cash in lieu of a bond to cover costs, in the alternative.

“In its elementary sense, however, the word ‘or’ as used in a statute, is a disjunctive particle indicating an alternative. It often connects a series of words or prepositions, presenting a choice of either. If the disjunctive conjunction ‘or’ is used, the various members of the sentence are to be taken separately.”

50 *American Jurisprudence*, Statutes, Section 281.

If appellant should admit for the purpose of argument that the aforesaid Act 19, Session Laws of 1939, Section 4, and its provisions are ambiguous and uncertain, nevertheless, it should be interpreted so as to give the appellant herein, the benefits of any doubt in its construction.

“Where the language of a statute is ambiguous, the Courts will strive to avoid an interpretation imputing a design to distinguish between cases upon a course of reasoning too unsubstantial and too finely drawn for the regulation of human action, or producing arbitrary or incongruous results, or an anomalous, capricious, or senseless distinction or discrimination, or an unequal operation generally.”

50 *American Jurisprudence*, Statutes, Section 372.

Section 9557, Revised Laws of Hawaii 1945, provides that an appeal bond is necessary. In Act 1, Section 6, Session Laws of Hawaii 1945, with respect to the construction of the Revised Laws of Hawaii 1945, it is provided that: (in part)

“Section 6. *Construction of Revised Laws.* Provisions in the said sections and note shall be construed as continuations or amendments of applicable or corresponding provisions of previously existing laws and not as new enactments.”

In view of the above quoted section, it would appear that the 1939 Act which makes unnecessary the filing of an appeal bond has not been repealed.

Further, it is said that:

“The repeal of a statute is not to be inferred from a general and uncertain allusion to it in the repealing act.”

The King v. Yung Hong, 7 Haw. 359 (syllabus).

See also,

In re Okkots, 9 Haw. 402;

Republic of Hawaii v. Edwards, 12 Haw. 55;

Wahiawa Sugar Co. v. Waialua Agricultural Co., 13 Haw. 109.

VI.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING JUDGMENT QUASHING THE WRIT OF ERROR AND DENYING THE PETITION FOR REHEARING BECAUSE OF FAILURE TO FILE AN APPEAL BOND PRIOR TO THE ISSUANCE OF THE WRIT OF ERROR HEREIN BECAUSE THE EFFECT THEREOF WAS TO TAKE PROPERTY OF DEFENDANT, PLAINTIFF IN ERROR, WITHOUT DUE PROCESS OF LAW AND WITHOUT AFFORDING HIM AN OPPORTUNITY TO HAVE ALLEGED ERRORS COMMITTED TO HIS PREJUDICE IN THE TRIAL COURT SUBJECTED TO APPELLATE REVIEW, ALL IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. (Record, page 22.)

Assignment of Error VI is general in its scope, and since the determination of the issues involved herein depends upon the decision of this Court in the remaining assignments of error, for this reason argument will be deleted with leave of this Honorable Court.

VII.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING JUDGMENT QUASHING THE WRIT OF ERROR AND DENYING THE PETITION FOR REHEARING BECAUSE OF FAILURE TO FILE AN APPEAL BOND PRIOR TO THE ISSUANCE OF THE WRIT OF ERROR HEREIN ON THE FOLLOWING GROUNDS:

IN CONSTRUING THE MEANING OF MONEY JUDGMENT IN SECTION 2529, REVISED LAWS OF HAWAII 1925 (NOW SECTION 9557, REVISED LAWS OF HAWAII 1945), IT WAS HELD BY THE SUPREME COURT OF THE TERRITORY OF HAWAII IN EDWARD KUAPUHI, ALSO KNOWN AS E. J. KUAPUHI, AND KEAKAKU (#) V. CATHERINE K. PA AND McBRYDE SUGAR COMPANY, LIMITED, 31 HAWAII 623, THAT A JUDGMENT FOR COSTS IS A MONEY JUDGMENT. THE SUPREME COURT OF THE TERRITORY OF HAWAII, INCORPORATED IN ITS PER CURIAM DENYING THE PETITION FOR REHEARING, DATED NOVEMBER 19, 1948, AND UPON WHICH PER CURIAM DECISION THE JUDGMENT OF THE SUPREME COURT APPEALED FROM HEREIN IS BASED, THE FOLLOWING LANGUAGE:

“* * * THE 1939 STATUTE (MEANING ACT 19, SESSION LAWS OF HAWAII 1939. SEE ASSIGNMENT V, SUPRA) REFERRED TO AMENDED SECTION 3556, SUPRA (REVISED LAWS OF HAWAII 1935, FORMERLY REVISED LAWS OF HAWAII 1925, SECTION 2529, AND NOW REVISED LAWS OF HAWAII 1945, SECTION 9557), BUT DID NOT REPEAL THE PROVISION REQUIRING A BOND TO PAY THE JUDGMENT. IT DID REPEAL A PROVISION FOR THE FILING OF A BOND OR THE DEPOSIT OF CASH IN LIEU THEREOF TO COVER COSTS ON WRIT OF ERROR, EXCEPTIONS OR APPEAL, TO THE SUPREME COURT. THE 1939 STATUTE DID NOT, THEREFORE, JUSTIFY THE FAILURE TO FILE THE BOND REQUIRED BY SECTION 9557, SUPRA. UNDER THE CIRCUMSTANCES THIS COURT DID NOT ACQUIRE JURISDICTION OF THE CAUSE.”

IN VIEW OF THE DECISION OF THE SUPREME COURT HERETOFORE REFERRED TO IN 31 HAWAII 623, COUPLED WITH THE FACT THAT THE COSTS WERE MERGED IN

THE JUDGMENT OF THE CIRCUIT COURT FROM WHICH THE WRIT OF ERROR WAS ISSUED BY THE SUPREME COURT, THE PROVISIONS OF SECTION 4, ACT 19, SESSION LAWS OF HAWAII 1939, DISPENSED WITH THE FILING OF ANY BOND OR THE DEPOSIT OF CASH IN LIEU OF BOND TO COVER COSTS ON APPEAL, UNDER THE LIMITED INTERPRETATION GIVEN SAID SECTION 4, ACT 19, SESSION LAWS OF HAWAII 1939, BY THE SUPREME COURT OF THE TERRITORY OF HAWAII IN THE AFORESAID PER CURIAM DECISION; AND IT FOLLOWS THAT THE ENTIRETY OF THE CIRCUIT COURT JUDGMENT WAS NON SEPARABLE FOR APPELLATE REVIEW PROCEDURE. SO, IF AS THE SUPREME COURT RULES IN THE SAID PER CURIAM DECISION A BOND IS NOT REQUIRED FOR COSTS—A JUDGMENT FOR COSTS BEING A MONEY JUDGMENT—NO APPEAL BOND WAS NECESSARY FOR THE SUPREME COURT TO ACQUIRE JURISDICTION AND FOR THE ISSUANCE OF THE WRIT OF ERROR TO BRING UP THE CIRCUIT COURT JUDGMENT IN ITS ENTIRETY FOR APPELLATE REVIEW. (Record, pages 22-24.)

At the outset, it may be pointed out that inasmuch as the Specification of Error No. VII is set out at some length and supported by argument therein, further elucidation would be somewhat repetitious, and consequently appellant will argue this specification only briefly.

The main issue in this appeal is whether the Supreme Court of the Territory of Hawaii did not or did have jurisdiction over the instant case, and the answer to that question lies in the determination of whether or not the filing of a bond was necessary.

Now in the case of *Kuapuhi v. Pa*, 31 Haw. 623, decided in 1930, which construed the meaning of a money judgment under Section 2529, Revised Laws of Hawaii 1925, presently Section 9557, Revised Laws

of Hawaii 1945, it was held that a judgment for costs is a money judgment. In that case the Court said,

“It is conceded, as it must be, that the judgment for costs is a money judgment and that under Section 2529, R. L. 1925, it was necessary to the issuance of the writ to file a bond securing such costs.” (pp. 624, case *supra*.)

The Supreme Court of the Territory of Hawaii, in its *per curiam* denying the petition for rehearing herein, stated that the 1939 statute, referring to Act 19, Session Laws of Hawaii 1939, did not repeal the provision requiring a bond to pay the judgment, but that what it did do was to repeal a provision for the filing of a bond or the deposit of cash in lieu of a bond to cover costs on writ of error, exceptions or appeal. It is essential to note that by this decision (Rec. pp. 14) it is plainly to be inferred that no bond is necessary or required in the case of costs.

It is seen that the Supreme Court has held that a judgment for costs is a money judgment. Also, it is a fact that in the instant case, the costs were mixed and merged in the money judgment of the Circuit Court, as is shown on page 2 of the record herein, which judgment shows that a money judgment was entered against the appellant for \$9,612.70 together with \$100.00 allowed as cost, or a total of \$9,712.70, and that as a result the cost and judgment here are inseparable.

Now inasmuch as the Supreme Court has given Section 4, Act 19, Session Laws of Hawaii 1939, a

very limited interpretation, viz., that it merely deleted a requirement for the filing of a bond to cover cost, on appeal, and a judgment for costs is a money judgment, and because in the instant case the judgment was combined with costs, and therefore inseparable, no appeal bond was necessary for the issuance of the writ of error.

CONCLUSION.

Upon the reasoning hereinbefore advanced and authorities cited, appellant urges that the Supreme Court of Hawaii erred in quashing the writ of error and in denying petition for rehearing, and accordingly respectfully requests that this matter be remanded to the Supreme Court of Hawaii with appropriate directives as in the judgment of this Honorable Court may seem expedient and conducive to the interests of justice.

Dated at Honolulu, T. H.,
May 6, 1949.

Respectfully submitted,

ARTHUR K. TRESK,
*Attorney for Filipino Federation of
America, Incorporated, Appellant.*

No. 12,155

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FILIPINO FEDERATION OF AMERICA,
INCORPORATED, a foreign corporation
doing business in the Territory of
Hawaii,

Appellant,

vs.

STANLEY NICHOLSON, a minor by Ed-
ward J. Nicholson, next friend and
guardian ad litem,

Appellee.

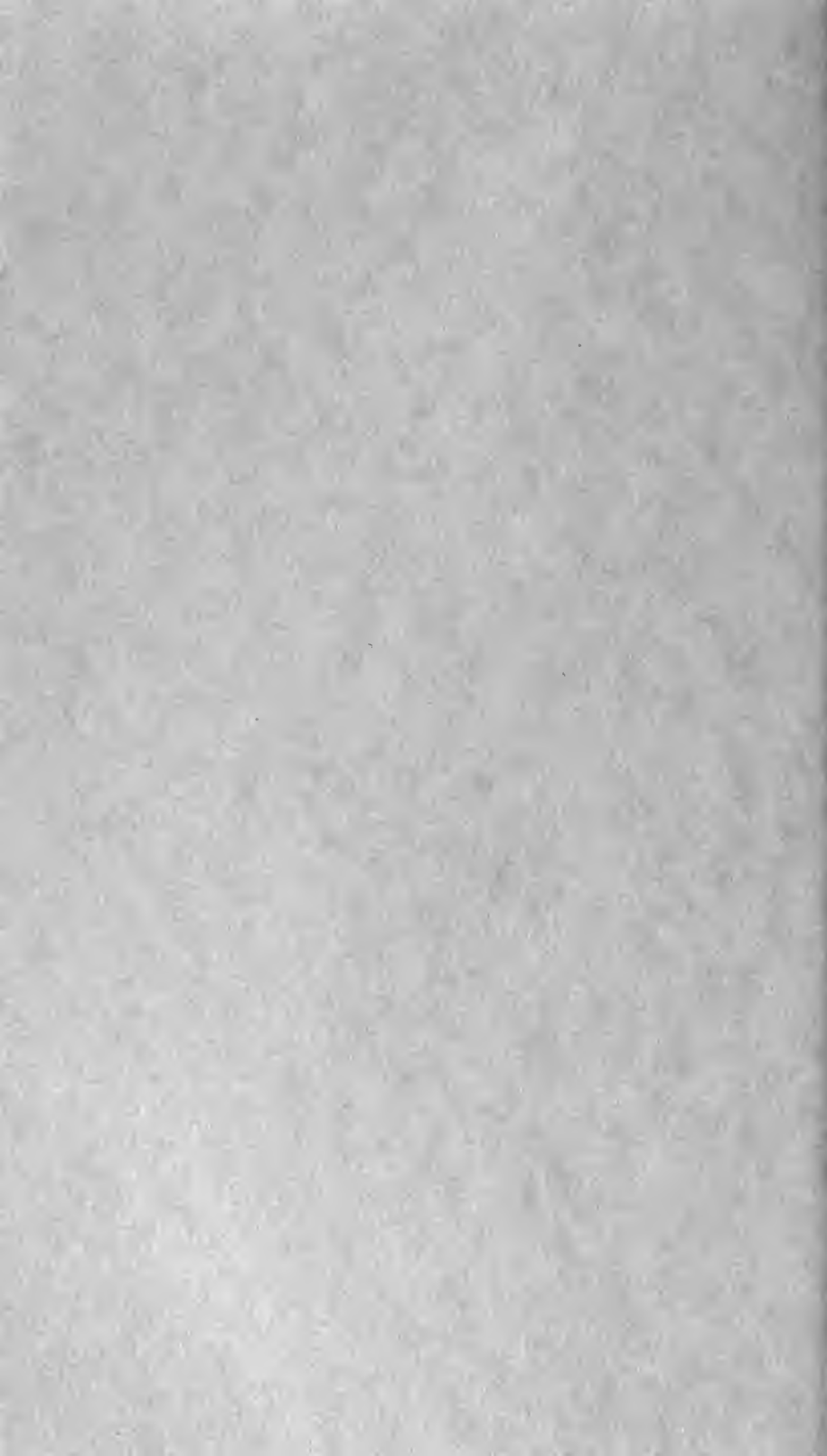
**On Appeal from the Supreme Court of the
Territory of Hawaii.**

BRIEF FOR APPELLEE.

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307 Hawaiian Trust Building, Honolulu 13, T. H.,

Attorney for Appellee.



Subject Index

| | Page |
|---|------|
| Argument : | |
| 1. That this Honorable Appellate Court will not overrule and reverse the decision of the Supreme Court of the Territory of Hawaii in regards to the meaning of Section 9557 of the Revised Laws of Hawaii, 1945, unless there be manifest error, and that there was no manifest error therein | 1 |
| Conclusion | 8 |

Table of Authorities Cited

| Cases | Pages |
|---|--------------|
| A. Lester Marks v. Waiahole Water Company, Limited (1942), 36 Hawaii 188, 190 | 7 |
| Edward Kuapuhi and Keakaku (w) v. Catherine K. Pa and McBryde Sugar Company, Limited (1930), 31 Hawaii 623, 624 | 3 |
| Honolulu Rapid Transit Co., Ltd. v. Wilder (CCA, 9th Circuit, 1929), 36 F. (2d) 159, 160 | 2, 6 |
| Honolulu Rapid Transit Co., Ltd. v. Wilder, 30 Hawaii 685 at 690 | 5 |
| Lord v. Territory of Hawaii (CCA, 9th Circuit, 1935), 79 F. (2d) 761, 764 | 2 |
| Maria Espinda Akana v. William K. Espinda (1935), 33 Hawaii 314, 315 | 4 |
| Pioneer Mill Co., Limited v. Victoria Ward, Limited, et al. (CCA, 9th Circuit, 1946; rehearing denied December 11, 1946), 158 F. (2d) 122, 125. Writ of certiorari denied March 17, 1947, in 67 S. Ct. 979..... | 2 |
| Stetson v. United States et al. (CCA, 9th Circuit, 1946), 155 F. (2d) 359, 361 | 2 |
| Susan Laffoon v. Lamont Alonzo Laffoon (1945), 37 Hawaii 107, 108, 109 | 4 |
| W. Au Hoy v. Ching Mun Shee, et al. (1934), 33 Hawaii 239, 241 | 3, 7 |

Statutes

| | |
|--|------------------|
| Revised Laws of Hawaii 1945, Section 9557..... | 2, 3, 4, 6, 7, 8 |
|--|------------------|

Other Authorities

| | |
|--|---|
| 50 Am. Jur., Statutes, Section 225, pages 204, 205 | 5 |
| 50 Am. Jur., Statutes, Section 355, page 357..... | 8 |
| 36 Cyc. 1106 | 5 |
| 2 Lewis' Sutherland Stat. Const. 2d, 665..... | 6 |

No. 12,155

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On Appeal from the Supreme Court of the
Territory of Hawaii.

BRIEF FOR APPELLEE.

ARGUMENT.

THAT THIS HONORABLE APPELLATE COURT WILL NOT OVER-
RULE AND REVERSE THE DECISION OF THE SUPREME
COURT OF THE TERRITORY OF HAWAII IN REGARDS TO
THE MEANING OF SECTION 9557 OF THE REVISED LAWS
OF HAWAII, 1945, UNLESS THERE BE MANIFEST ERROR,
AND THAT THERE WAS NO MANIFEST ERROR THEREIN.

Appellant advances no argument in its Assignment
of Error VI. (Brief of Appellant, p. 25.) Said As-
signment of Error is therefore waived.

“Thereby 17 alleged errors were assigned. As required by Rule 20 of our general rules, appellant has filed with the clerk of this Court 20 copies of a brief. Therein only three alleged errors are argued. Errors assigned, but not argued, are deemed waived.” *Stetson v. United States et al.* (CCA, 9th Circuit, 1946), 155 F. (2d) 359, 361.

It is submitted that this Honorable Appellate Court will not overrule and reverse the decision of the Supreme Court of the Territory of Hawaii in regards to the meaning of Section 9557 of the Revised Laws of Hawaii, 1945, unless there be manifest error.

“The first question thus presented involves the construction of local tax laws, and *the rule is well settled that an appellate court will not disturb the construction placed on such laws by the Supreme Court of a territory, except for manifest error.*” *Honolulu Rapid Transit Co., Limited, v. Wilder* (CCA, 9th Circuit, 1929), 36 F. (2d) 159, 160. (Italics ours.)

“This construction of the territorial statute by the Supreme Court of the territory should be accepted by us, unless manifestly erroneous.” *Lord v. Territory of Hawaii*, (CCA, 9th Circuit, 1935) 79 F. (2d) 761, 764.

“It is clear that these specifications present questions of local laws only. *Our power to reverse rulings of the territorial court on law or fact is limited to cases of manifest error.*” *Pioneer Mill Co., Limited v. Victoria Ward, Limited, et al.*, (CCA 9th Circuit, 1946; Rehearing denied December 11, 1946) 158 F (2d) 122, 125. Writ of Certiorari denied March 17, 1947, in 67 S. Ct. 979. (Italics ours.)

And it is submitted that there was no manifest error in the decision of the Supreme Court of the Territory of Hawaii, in the cause herein, in regards to the meaning of Section 9557 of the Revised Laws of Hawaii, 1945.

The Supreme Court of the Territory of Hawaii, in the cause herein, decided that Section 9557 of the Revised Laws of Hawaii, required, as a condition precedent of the issuance of a writ of error, the filing "with the clerk, a bond in favor of the prevailing party conditioned for the payment of the judgment in the original cause in case of failure to sustain the writ of error." (Transcript of Record, p. 13.)

In so deciding, the Supreme Court of the Territory of Hawaii was following a line of decisions it previously had rendered.

"It is conceded, as indeed it must be, that the judgment for costs is a money judgment and that under section 2529, R. L. 1925, it was necessary to the issuance of the writ to file a bond securing such costs * * *.

"* * * *The filing of a bond is by section 2529 made a prerequisite to the issuance of a writ of error and is therefore indispensable to the jurisdiction of this court.*" *Edward Kuapuhi and Keakaku (W) v. Catherine K. Pa and McBryde Sugar Company, Limited*, (1930) 31 Hawaii 623, 624. (Italics ours; Section 2529 is substantially Section 9557 of the Revised Laws of Hawaii, 1945.)

Similarly, *W. Au Hoy v. Ching Mun Shee, et al.* (1934), 33 Hawaii 239, 241; *Maria Espinda*

Akana v. William K. Espinda, (1935) 33 Hawaii 314, 315.

“The right to appeal is purely statutory. The provisions of Section 3556 are clearly mandatory and are free of any ambiguity. *That section explicitly requires as a prerequisite to the issuance of a writ of error the filing with the clerk of a bond upon specific terms and conditions.*” *A. Lester Marks v. Waiahole Water Company, Limited* (1942), 36 Hawaii 188, 190. (Italics ours; Section 3556 is substantially Section 9557 of the Revised Laws of Hawaii, 1945.)

“To reverse this judgment defendant sued out a writ of error in this court but did not file with the clerk a bond, ‘conditioned for the payment of the judgment in the original cause in case of failure to sustain the writ of error.’ R.L.H. 1945, Section 9557.

“For the failure of the defendant-plaintiff in error to file such a bond, the plaintiff-defendant in error has moved that the writ of error be dismissed * * *

“The writ of error is * * * dismissed.” *Susan Laffoon v. Lamont Alonzo Laffoon*, (1945) 37 Hawaii 107, 108, 109. (Significantly, counsel for the movant, the plaintiff-defendant in error, therein was A. Trask, the counsel for the appellant herein.)

Nevertheless, the appellant, in effect and in essence, argues that the Supreme Court of the Territory of Hawaii, in the cause herein, erred in its decision in regards to the meaning of Section 9557 of the Revised Laws of Hawaii, 1945, in that it failed to re-

sort to certain rules of statutory construction in arriving at said decision. (Brief of Appellant, pp. 6-29.)

But, where the language of the statute is clear and unambiguous, resort to the rules of statutory construction is dispensed with in determining its meaning.

“A statute is not open to construction as a matter of course. It is open to construction only where the language used in the statute requires interpretation, that is, where the statute is ambiguous, or will bear two or more constructions, or is of such doubtful or obscure meaning. *Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation*, and the court has no right to look for or impose another meaning.” 50 *American Jurisprudence, Statutes*, Section 225, pp. 204, 205. (Italics ours.)

“It is argued that this court, under the guise of the rules of statutory construction, should rewrite section 2529 so that it will authorize the doing of a thing which the statute in its present form expressly prohibits and thus have this court invade what the law has set apart as an exclusive field of legislation. In construing a statute the object is always to ascertain and give effect to the intention of the legislaturê. Where a statute is dubious courts will resort to a consideration of the reason and spirit of it or the cause which induced its enactment. As this court clearly pointed out in its opinion in *Honolulu R. T. Co. v. Wilder*, 30 Haw. 685 at 690 (quoting from 36 Cyc. 1106):

‘This intention’ (legislative purpose), ‘however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority.’ The above opinion was affirmed by the circuit court of appeals, ninth circuit. See 36 Fed. (2d) 159. Another eminent authority stating the same rule in different language says: ‘The statute itself furnishes the best means of its own exposition; and if the intent of the act can be clearly ascertained from a reading of its provisions, and all its parts may be brought into harmony therewith, that intent will prevail without resorting to other aids for construction.’ 2 Lewis Sutherland, Stat. Const., 2d., 665.” *W. Au Hoy v. Ching Mun Shee*, supra, pp. 241, 242.

It is readily apparent that Section 9557 of the Revised Laws of Hawaii, 1945, is clear and unambiguous.

“No writ of error shall issue until the sum provided by section 9746 has been deposited to cover costs, and, except in criminal cases and cases in which there is no money judgment, a bond has been filed with the clerk, in favor of the prevailing party in the proceeding in which the error is alleged to have occurred, or his personal representatives, conditioned for the payment of the judgment in the original cause in case of failure to sustain the writ of error.” *Section 9557 of the Revised Laws of Hawaii, 1945.*

It was apparent to the Supreme Court of the Territory of Hawaii.

“*Section 2529, R. L. 1925, is entirely free from any ambiguity whatsoever. Its terms are clear*

and unmistakable. It is susceptible of no judicial construction because there can be no doubt of its meaning. It contains no harsh, unjust or unusual provisions and the reasons which induced its enactment are obvious. It clearly was the intention of the legislature to prohibit the issuance of a writ of error by the clerk of this court until the plaintiff in error had deposited the sum of twenty-five dollars to cover costs which was to insure the payment of court costs and the filing of a bond with the clerk in favor of the prevailing party which of course was for the protection of the latter. There is nothing absurd, mischievous or unreasonable in these requirements and compliance therewith is a simple matter." *W. Au Hoy v. Ching Mun Shee, et al.*, supra, p. 242. (Italics ours; Section 2529, R. L. 1925 is substantially section 9557 of the Revised Laws of Hawaii, 1945.)

"The provisions of Section 3556 are clearly mandatory and are free of any ambiguity." *A. Lester Marks, et al. v. Waiahole Water Company, Limited*, supra, p. 190. (Italics ours; Section 3556 is substantially Section 9557 of the Revised Laws of Hawaii, 1945.)

And it seems to have been apparent to the Appellant.

"Now what is the effect of Section 9557, Revised Laws of Hawaii, 1945? A close examination of that section will show that it apparently makes necessary a filing of a bond in favor of the prevailing party before a writ of error is to be issued." (Brief of Appellant, p. 20.)

In Assignment of Error V, Appellant seeks to make Section 9557 of the Revised Laws of Hawaii, 1945, ambiguous by the consideration of certain prior statutes of the Territory of Hawaii. (Brief of Appellant, pp. 18-21.)

It is submitted that

“A study of the law as it was prior to the enactment of the statute to be construed is only profitable insofar as it may aid in the interpretation of the act, and the rule of construction of statutes in *pari materia* does not permit the use of a previous statute to control the plain language of a subsequent statute. Where a statute is clear on its face, and, when standing alone, is fairly susceptible of but one construction, the courts will adopt that construction and refuse to consider prior statutes on the same subject. Prior acts may be resorted to solve but not to create an ambiguity.” *50 American Jurisprudence, Statutes*, Section 355, p. 357.

CONCLUSION.

Upon the foregoing, the Appellee hereby respectfully urges the Honorable Appellate Court to dismiss the appeal herein from the Supreme Court of the Territory of Hawaii.

Furthermore, the Appellee hereby respectfully urges the Honorable Appellate Court to invoke its Rule 26 (2) and award to the Appellee as against the Appellant, damages at a rate not exceeding ten per cent of the judgment entered by the Circuit Court

of the First Judicial Circuit, Territory of Hawaii, (Transcript of Record, p. 2) in that it appears that this appeal herein was sued out merely to delay proceedings on said judgment.

Dated, Honolulu, T. H.

June 3, 1949.

Respectfully submitted,

SHIRO KASHIWA,

Attorney for Appellee.

No. 12,155

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FILIPINO FEDERATION OF AMERICA,
INCORPORATED,

Appellant,

VS.

STANLEY NICHOLSON, a minor, by Edward J. Nicholson, next friend and guardian ad litem,

Appellee.

On Appeal from the Supreme Court of the
Territory of Hawaii.

REPLY BRIEF FOR APPELLANT.

ARTHUR K. TRASK,

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America, Incorporated, Appellant.*



Subject Index

| | Page |
|---|------|
| Argument | 1 |
| That this Honorable Appellate Court should overrule and reverse the decision of the Supreme Court of the Territory of Hawaii concerning the interpretation of Section 9557 of the Revised Laws of Hawaii, 1945, because there was manifest error; but that regardless of whether or not the error committed was manifest, the decision should be overruled and reversed | 1 |
| Conclusion | 6 |

Table of Authorities Cited

| Cases | Pages |
|---|---------|
| Akana v. Espinda, 33 Haw. 314 | 2 |
| Carcadden v. Territory of Alaska, 105 F. 2d 377 (1939).... | 3 |
| De Castro v. Board of Com'rs of San Juan (1944), 64 S. Ct. 1121, 322 U. S. 451, 88 L. Ed. 1384..... | 5 |
| Kuapuhi et al. v. Pa et al., 31 Haw. 623..... | 2 |
| Marks v. Waiahole Water Co., Ltd., 36 Haw. 188..... | 2 |
| Susan Laffoon v. Lamont Alonzo Laffoon, 37 Haw. 107.... | 2, 5, 6 |
| W. Au Hoy v. Ching Mun Shee et al., 33 Haw. 239..... | 2 |
| Whitmer v. El Paso & S. W. Co. (Tex., 1912), 201 F. 193, 119 C.C.A. 637..... | 3, 4 |

Statutes

| | |
|---|------|
| 28 U.S.C.A., Sec. 225A | 4 |
| Revised Laws of Hawaii, 1945, Section 9557..... | 1, 2 |

No. 12,155

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STANLEY NICHOLSON, a minor, by Edward J. Nicholson, next friend and guardian ad litem,

Appellee.

On Appeal from the Supreme Court of the
Territory of Hawaii.

REPLY BRIEF FOR APPELLANT.

ARGUMENT.

THAT THIS HONORABLE APPELLATE COURT SHOULD OVERRULE AND REVERSE THE DECISION OF THE SUPREME COURT OF THE TERRITORY OF HAWAII CONCERNING THE INTERPRETATION OF SECTION 9557 OF THE REVISED LAWS OF HAWAII, 1945, BECAUSE THERE WAS MANIFEST ERROR; BUT THAT REGARDLESS OF WHETHER OR NOT THE ERROR COMMITTED WAS MANIFEST, THE DECISION SHOULD BE OVERRULED AND REVERSED.

Appellant denies the contentions of appellee as stated in his brief, for and because of the following reasons hereinafter set forth:

It is noted, first, that in the brief of the appellee there is no denial that there has been error committed

by the Supreme Court of Hawaii, but his entire brief is based upon the allegation that there has been no *manifest* error committed. Therefore, appellant, in answering, assumes by inference that appellee admits that there was error, but that the error committed was not *manifest*. Appellant re-submits and emphasizes that there *was manifest error* committed by the Supreme Court of Hawaii, in that whenever a writ of error is refused and an appeal dismissed for failure to comply literally with the provisions of a statute, that this penalizes the appellant, creates a forfeiture, and constitutes *manifest* error.

It is noted that appellee, in support of his argument that the interpretation of Section 9557 by the Supreme Court of Hawaii did not constitute manifest error, quotes the cases of *Kuapuhi et al. v. Pa et al.*, 31 Haw. 623; *W. Au Hoy v. Ching Mun Shee et al.*, 33 Haw. 239; *Akana v. Espinda*, 33 Haw. 314; and *Marks v. Waiahole Water Co., Ltd.*, 36 Haw. 188. All of the aforementioned group of cases have been carefully weighed, distinguished and discounted by appellant in its opening brief, and, therefore, it is submitted, should not be given any particular weight or consideration, since appellant, as heretofore stated, has indicated fully the judicial status of these cases in Hawaii. Furthermore, the case of *Susan Laffoon v. Lamont Alonzo Laffoon*, 37 Haw. 107, cited by appellee in his brief should not be considered as having any probative bearing on the matter of whether the requirements of Section 9557, Revised Laws of Hawaii, 1945, are jurisdictional or procedural, since *Laffoon v. Laffoon* does not even discuss or raise this primary question.

However, assuming solely for the purpose of argument that the error committed by the Supreme Court of Hawaii was not manifest, appellant submits that the following cases nevertheless give this Honorable Court the requisite authority and precedent to exercise its sole judgment.

In *Carcadden v. Territory of Alaska*, 105 F. 2d 377, (1939), which was an appeal from a judgment of the District Court of the Territory of Alaska, dismissing a claim made by the appellant to property declared escheated to the Territory on ground that the claim was barred by limitation, this Court held that in reviewing decisions of the District Court of the Territory of Alaska, the Circuit Court of Appeals exercises *independent judgment with respect to general, local and federal questions and review of decisions of Court on general or local law is not limited to cases of manifest error*. (Emphasis added.) This holding, then, results in only one conclusion, to-wit: that the Circuit Court of Appeals, in reaching its decision is unfettered by the decisions of the trial Court, and can and should properly exercise its independent judgment in curing any errors committed by the Territorial Supreme Court, *irrespective of whether the error is "manifest" or not*. (Emphasis supplied.)

Furthermore, in *Whitmer v. El Paso & S. W. Co.* (Tex., 1912), 201 F. 193, 119 C.C.A. 637, it was held that a decision of the Court of last resort of a territory construing a statute of that territory is entitled to respect by a Court of the United States, but is *not so controlling like a decision of a State Court of last resort*. (Emphasis ours.)

In this connection, appellant would like to point out that while judicial authority to the effect that a Court of the United States should be bound by the interpretations placed upon state statutes by the highest Court of a State, the reason for the rule does not apply where the Territories of the United States are concerned in that they are creatures of Congress, and necessarily subservient thereto, whereas the several States of the United States occupy a vastly different role, being sovereign in so far as they exercise such powers as are not granted to the United States by the Constitution. Therefore, it would seem that the situation would call for the application of the maxim of *cessante ratione legis cessat ipsa lex*.

“The Circuit Court of Appeals shall have * * * jurisdiction to review by appeal, final decisions * * * (4) In the Supreme Court of the Territory of Hawaii.”

U.S.C.A. Tit. 28, Sec. 225A.

The cases cited by the appellee enunciating the rule that the power of a Federal Appellate Court to reverse rulings of a territorial Court on law or fact is limited to cases of manifest error, appear to result in or amount to judicial legislation, if the result is to limit appellate review of decisions of territorial Courts only in cases of manifest error, inasmuch as the statutes do not so limit the federal appellate jurisdiction to cases of manifest error only. See, *Whitmer v. El Paso & S. W. Co.*, cited supra.

Appellee apparently wishes this Honorable Court to summarily dispose of and dismiss this appeal and

waive the matter away without much ado on the basis of his allegation that there was no manifest error.

In the case of *De Castro v. Board of Com'rs of San Juan* (1944), 64 S.Ct. 1121, 322 U.S. 451, 88 L.Ed. 1384, the Supreme Court of the United States said with respect to a case arising from Porto Rico:

“The rule that a rule announced by an insular court will be rejected only on a clear showing that it does violence to recognized principles of local law or established practices of the local community *is not a mere mechanical devise that requires or admits, save in exceptional cases, of the summary disposition of appeals from such courts, nor does it minimize the importance or dignity of the appellate function in such cases*, but it imposes on reviewing courts a peculiarly delicate task of examining and appraising the local law in its setting with the sympathetic disposition to safeguard in matters of local concern, the adaptability of the law to local practices and needs.”

Any serious consideration of the present issue, by reviewing the Hawaiian cases decided, subsequent to the enactment of the 1939 statute, reveals a total silence of the provisions of this very pertinent statute. Counsel for appellant was attorney for the appellee in *Laffoon v. Laffoon*, supra, whose motion that the appeal should be dismissed for failure of a bond was granted. In that case, the 1939 statute was not referred to or considered; as a matter of fact, its enactment was unknown at that time to counsel and not even discussed by the Court. Therefore, manifestly, appellant contends that the decision of the Supreme Court of Hawaii, as herein presented for review

by this Honorable Court, because of a distinct failure on the part of the printer, or those persons in charge of arranging the annotation of this statute, effected, or led, the local Court into a positive oversight and resultant error; and it is contended further that due process is violated by this local decision, which in effect seeks to perpetuate a precedent of error.

CONCLUSION.

Upon the reasoning herein advanced and authorities cited, appellant urges that the Supreme Court of Hawaii erred in quashing the writ of error and in denying petition for rehearing, and accordingly respectfully requests again, that this matter be remanded to the Supreme Court of the Territory of Hawaii with appropriate directives; and further, appellant respectfully urges, in view of the authorities and arguments presented hereinbefore, that appellee's charges that the appeal herein was sued out "merely to delay proceedings on said judgment," is the very type of irresponsible argument that due process must remedy.

Dated, Honolulu, T. H.,

June 13, 1949.

Respectfully submitted,

ARTHUR K. TRASK,

*Attorney for Filipino Federation of
America, Incorporated, Appellant.*

No. 12156

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH RUFUS LANGFORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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FILED

MAY 12 1949

PAUL P. O'BRIEN,

CLERK



TOPICAL INDEX

| | PAGE |
|--|------|
| Jurisdictional statement | 1 |
| Statement of the case..... | 3 |
| Argument | 10 |
| The verdict is not against the law..... | 10 |
| There is sufficient evidence to support the verdict..... | 15 |
| Remarks of Government counsel to the jury were not prejudicial to the appellant..... | 17 |
| The court did not commit error in admitting into evidence certain testimony offered by the Government..... | 18 |
| Conclusion | 19 |

TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|--|--------|
| Alpin v. United States, 41 F. 2d 495..... | 13 |
| Dunn v. United States, 284 U. S. 390..... | 13 |
| Ellis v. United States, 138 F. 2d 612..... | 18 |
| Mallory v. United States, 126 F. 2d 192..... | 13 |
| Mortensen v. United States, 322 U. S. 369..... | 10, 13 |
| Neff v. United States, 105 F. 2d 688..... | 18 |
| Tedesco v. United States, 118 F. 2d 737..... | 12 |
| United States v. Fleenor, 162 F. 2d 935..... | 12 |
| United States v. Krulewitch, 145 F. 2d 76..... | 18 |
| United States v. Mitchell, 138 F. 2d 831..... | 12 |
| United States v. Reginelli, 133 F. 2d 595..... | 11, 18 |

STATUTES

| | |
|--|---|
| United States Code (1946 Ed.), Title 18, Sec. 398..... | 1 |
| United States Code, Title 28, Sec. 225(a), (d)..... | 2 |

No. 12156

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH RUFUS LANGFORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

Jurisdictional Statement.

(a) The United States District Court for the Southern District of California had jurisdiction of the appellant and the subject matter under Title 18, United States Code, Section 398 (1946 Ed.), making it unlawful for any person to knowingly transport any woman or girl in foreign commerce for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

(b) The appellant was charged in Count One of the Indictment with knowingly transporting and causing to be transported one Evelyn Della Mazur, also known as Carol Jones, from Los Angeles County, California, within the

Central Division of the Southern District of California, to Tiajuana, Baja California, Mexico, for the purposes of prostitution, debauchery, and other immoral practices, and with intent and purpose on the part of the appellant to induce, entice, and compel said Evelyn Della Mazur to become a prostitute and give herself up to debauchery and to engage in other immoral practices, on or about April 5, 1948.

The appellant was charged in Count Two of the Indictment with knowingly transporting and causing to be transported said Evelyn Della Mazur, also known as Carol Jones, from Tiajuana, Baja California, Mexico, to Los Angeles County, California, in the Central Division of the Southern District of California, for the same purposes as alleged in Count One above, on or about April 6, 1948.

(c) This Court has jurisdiction of the appeal under the provisions of Section 225 (a) and (d) of Title 28, United States Code.

(d) A motion was made by counsel for defendant for a judgment of acquittal as to both counts at the close of the Government's case [Clk. Tr. 9].

(e) A verdict of not guilty as charged in Count One, and guilty as charged in Count Two of the Indictment, was returned by the jury on January 4, 1949, after a trial of the case [Clk. Tr. 12].

(f) It was adjudged that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years, following the verdict of the jury [Clk. Tr. 14].

Statement of the Case.

The statement of facts set forth in Appellant's Opening Brief, commencing on page 2 thereof, is not acceptable to appellee for the reason that the statement is incomplete and hence selective, is interpretative, and does not conform to the testimony as a whole. The following summary of the evidence is submitted as a more objective synopsis.

The appellant and defendant, Joseph Rufus Langford, is an adult, Negro male. In the latter part of January, 1948, he resided at 938 East 21st Street, in Los Angeles, California [Rep. Tr. 33].

At Brother's Rendezvous, on lower Central Avenue, Los Angeles, California, the appellant first met Evelyn Della Mazur, Caucasian, also known as Carol Jones, and herein-after referred to as Jones. This meeting occurred in the early morning hours of some day late in January of 1948 [Rep. Tr. 30, 56, 61, 62, 63].

Jones, who was twenty years old at the time of trial, first came to California early in January, 1948. She was at that time married to a former Army officer, this marriage being dissolved by a divorce decree of February, 1948, in the State of Illinois. She testified that prior to coming to California, and while living at the home of her mother in Rockford, Illinois, she had engaged in illicit sexual relations with one Tommy Risby, Negro, over a period of about three months; that she was graduated from Bradley University, Peoria, Illinois, in June, 1947, taking a degree in sociology and applied psychology; that she had never engaged in prostitution prior to her meeting with the appellant [Rep. Tr. 56, 57, 58, 59, 60, 68, 69].

At the time of the first meeting of the appellant with Jones, the appellant invited her to go home with him. She complied, going to bed with him and engaging in sexual

intercourse [Rep. Tr. 31, 32, 69]. From that day early in January, 1948, until sometime in May, 1948, Jones resided with the appellant continuously except for three intervals of a week or less when she lived apart from the appellant [Rep. Tr. 70, 71, 72, 73, 74, 75, 76].

A few days after Jones moved in with the appellant, he appeared at their 21st Street address with four sailors and asked her to engage in acts of sexual intercourse with them for money. After at first refusing, she engaged in sexual intercourse with three of them, receiving either \$10.00 or \$20.00 from each, which sums she gave to the appellant. At the time of this event, there was present a woman named Ann, a girl who was at that time engaged in acts of prostitution for the defendant [Rep. Tr. 33, 34, 35, 36, 37, 111, 112, 113].

Jones continued to work for the appellant as a prostitute from the date of the above described incident with the sailors until sometime in May, 1948, with the exception of the three intervals when she left the appellant and was living apart from him [Rep. Tr. 38].

The appellant started her out as a prostitute, making her first connections for her and occasionally bringing in a customer. As Jones' circle of regular customers grew, the appellant's task of securing clients was eased [Rep. Tr. 93, 94, 95, 96, 97, 98, 104]. Jones was required to turn all of her earnings as a prostitute over to the defendant during the time she lived with him [Rep. Tr. 37, 38, 100, 101, 102, 104, 105].

In March, 1948, Jones left the appellant, and moved to a motel on the Sunset Strip in Hollywood, California. She did not engage in prostitution during this interval. Three days later the appellant came upon her while she was seated in the car of another, took her from the car

and brought her back to the 21st Street address [Rep. Tr. 72, 73]. Jones testified that at that time she loved the appellant, but that the appellant forced her to return against her will.

Early in April, 1948, Jones again left the appellant, moving to an address on 50th Street in Los Angeles. She left him because of beatings she had received from the appellant. She was away from the appellant for three or four days before he appeared at the 50th Street address and requested that she return to him. On this occasion he cried a little and told Jones he desired to marry her. The testimony is not clear whether at that time he also promised her she would not have to work any more if she returned [Rep. Tr. 39, 40, 76].

Jones had suggested marriage to the appellant on several prior occasions, but was reluctant to be a wife and prostitute for appellant at the same time. Jones thereupon agreed to return [Rep. Tr. 77].

On April 5, 1948, the day following the appellant's proposal of marriage to Jones, the appellant moved her back to the 21st Street address; and on the same day, the appellant, Jones, and a friend named Melvin Bryant, went to Tiajuana, Mexico, the appellant driving his Packard automobile. The appellant and Jones made this journey for the purpose of getting married. They arrived in Tiajuana too late to get married so they went to a local night club called the Copacabana where they had dinner shortly after midnight. Jones testified that a sailor contacted the appellant outside the night club and as a result, she engaged in sexual intercourse with the sailor in the back seat of the defendant's car on the outskirts of Tiajuana, the sailor paying the appellant a sum of money for the act. She testified that the appellant was present at

the time, driving the car, that Bryant remained in the night club, and that this transaction took about twenty minutes [Rep. Tr. 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89].

Mr. Bryant, a singer and entertainer, who lived with the appellant from about March, 1948, to the time Jones finally left the appellant in early May, 1948, stated that during the course of the evening at the Copacabana he did not recall the appellant and Jones being absent from the night club at any time [Rep. Tr. 117]; and also stated that he was not away from the appellant and Jones more than five minutes when they were in the night club [Rep. Tr. 125, 126].

Early in the morning of April 6, 1948, at about 5:30 a. m., the appellant, Jones and Melvin Bryant returned to the United States, spending the night at the Douglas Hotel in San Diego. On April 6, 1948, the party returned to Tiajuana, where the appellant and Jones signed certain documents for the purpose of entering into a marriage. After the signing of these documents, the party returned to the appellant's 21st Street address in Los Angeles, arriving about 5:00 or 6:00 p. m. on April 6, 1948. On arriving at appellant's home, Jones found a girl living at appellant's address. Jones testified that she moved the other girl out [Rep. Tr. 44, 45, 46, 47, 48, 49].

On the evening of the return from Tiajuana, the appellant and Jones and Bryant went to Brother's Rendezvous on lower Central Avenue in Los Angeles. Jones was at that time requested by appellant to immediately go back to work as a prostitute. Jones refused. The following day, April 7, 1948, Jones went back to work as a prostitute and continued to work as a prostitute for the appellant until about April 17, 1948 [Rep. Tr. 48, 50]. At this

time she again left the appellant, testifying at the trial that her reason for again leaving him was, "Because I was tired of it all" and went on to state that one "gets tired of working all day and all night, there is no appreciation, nothing is ever bought for you, they gripe about it when you want a new pair of hose" [Rep. Tr. 101].

When Jones left the appellant on or about April 17, 1948, she went to live with a friend, one Jimmy Monday, a doorman at Brother's Rendezvous. She was at Monday's about one week when the appellant moved in with her [Rep. Tr. 70, 71].

Sometime late in May or early in June, 1948, Jones ceased to work as a prostitute for the appellant and left him [Rep. Tr. 32, 38].

Jones also testified [Rep. Tr. 46] that she had to falsify her age at the time she and the appellant signed the nuptial application, or went through the marriage ceremony in Tiajuana, Mexico. The effect of this falsification on the application, or marriage, whichever it was, under Mexican law, is not known; however, it is clear that if Jones' testimony is correct, both she and appellant were cognizant of her falsification.

Questions Involved.

I. Whether or not there was any evidence from which the jury could properly find that the dominant purpose of the appellant in transporting Jones from Los Angeles County, California, to Tiajuana, Baja California, Mexico, and from Tiajuana, Baja California, Mexico, to Los Angeles County, California, was for an immoral purpose in violation of the Mann Act, viewing the journey to Mexico and return as an entity.

A. Where the appellant has, by his conduct, demonstrated that his subjective purpose in proposing

marriage and in marrying Jones, was to regain her affection and cause her to return to him and resume the career of prostitute for his benefit; and where, in order to carry out this subject purpose and plan, the appellant transports Jones in foreign commerce, is not such transportation in furtherance of such plan, a transportation of Jones for an immoral purpose, in violation of the Mann Act?

B. Where evidence is offered showing that appellant's dominant purpose in transporting Jones from Tiajuana, Mexico, to Los Angeles County, California, was to return her to her activities as a prostitute, is a finding by the jury that appellant is guilty under the Mann Act for such transportation a verdict against the law?

II. Whether or not there was any evidence from which the jury could rightly find that the dominant purpose of the appellant in transporting Jones from Tiajuana, Baja California, Mexico, to Los Angeles County, California, was for an immoral purpose, in violation of the Mann Act.

A. Where the appellant has, by his conduct, demonstrated that his dominant purpose, also his immediate purpose, in transporting Jones from Tiajuana, Baja California, Mexico, to Los Angeles County, California, was to return her to her familiar field of operation, where he could immediately put her back to work earning him money by her prostitution, is not such transportation a transportation of Jones for an immoral purpose in violation of the Mann Act?

B. If the appellant, under these circumstances, returns himself because Los Angeles County is his home, is not this motive nevertheless immaterial?

C. If Jones' reason for returning with the appellant is because she regards the appellant as her husband, and because she regards Los Angeles County as her home, are not these reasons nevertheless immaterial?

III. Whether or not it be error for Government counsel, in his closing argument to the jury, to comment on the failure of the appellant to testify in his own defense, when the Court fails to instruct the jury to disregard counsel's comment.

A. When defense counsel fails until the filing of his Appellant's Brief to cite or notice such comment as error?

B. When evidence against appellant is so conclusive as to negative the possibility of prejudice?

IV. Whether or not evidence of acts of prostitution performed by a woman other than Jones for the benefit of the appellant, and at the home of appellant, at a time when Jones was living with appellant and was embarking on a career as prostitute for the benefit of appellant, and performed about fifty days prior to the events of the Indictment, is relevant and material.

Whether or not it was error for the Court to fail to include in its instructions to the jury a specific instruction that such evidence was admitted only for the purpose of showing appellant's intent, when counsel for appellant never requested the instruction during trial.

A. Is such evidence admissible to show intent of appellant?

ARGUMENT.

It is submitted that the record amply sustains the verdict of the jury, and that there was sufficient evidence from which the jury could conclude that the appellant transported Jones in foreign commerce for a purpose forbidden by the Mann Act.

I.

The Verdict Is Not Against the Law.

A. An examination of the Government's argument to the jury [Rep. Tr. 154 to 161] reveals that the Government advanced two theories, on either of which the jury might properly have found the appellant guilty under Count Two of the Indictment. One theory was that the appellant married Jones not so much for the normal reasons that a man marries a woman, as for the purpose of causing her to return to him and continue to work for him as a prostitute. The other theory advanced in the argument was that the dominant purpose of the appellant in bringing Jones back to Los Angeles from Tiajuana, Mexico, was to get her back to work immediately earning money for the appellant as a prostitute.

Transportation of a woman to a foreign country for the purpose of entering into a marriage which was undertaken by the man with the design of thus enticing the woman back into prostitution, is clearly within the scope of the statute, which ". . . aims to penalize only those who use interstate commerce with a view toward accomplishing the unlawful purposes. To constitute a violation of the Act, it is essential that the interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities." (*Mortensen v. United States*, 322 U. S. 369, 374.) It is the contention of the

Government that the transportation of Jones to Mexico was the means adopted by the appellant, together with the marriage, for bringing Jones back into prostitution.

The transportation of a woman in foreign commerce for the purpose of returning her to prostitution is, of course, clearly within the area of the proscribed activities. Thus, a finding by the jury that Jones was transported by the appellant from Mexico to Los Angeles for the purpose of returning her to her activities as a prostitute, would require the jury to find the appellant guilty as charged in Count Two.

B. It appears that appellant argues that the intent, motive, or purpose necessary for the establishment of a crime may not rest in inference (App. Br. 9, 10, 11).

United States v. Reginelli (3rd Cir.), 133 F. 2d 595.

At page 595 the Court said:

“It should be noted that it was only the defendant’s purpose in bringing about the woman’s transportation that needed to be inferred. As already appears, the facts as to the interstate transportation and the immoral practices were directly proven by the oral testimony of witnesses.

“That the intent, motive, or purpose necessary for the establishment of a crime may rest in inference, hardly requires citation of authority.”

And again, page 598:

“True enough, the interstate transportation which the Mann Act makes penal is only such as is undertaken or initiated for the purpose of effecting, aiding or facilitating prostitution, debauchery, or other im-

moral practices. *Fisher v. United States*, 4th Cir., 266 Fed. 667, 670. But the purpose for which the interstate transportation is enlisted may be inferred from the conduct of the parties within a reasonable time before and after the transportation. See *Neff v. United States*, 8 Cir., 105 F. (2d) 688, 691. In *Grayson v. United States*, 8 Cir., 107 F. (2d) 367, 370,—a prosecution under the Mann Act,—the Court of Appeals had no doubt that ‘inferences as to intent may be gathered from subsequent acts and conduct.’ ”

It is clear from the above citation that purpose and motive of the appellant in the instant case may rest in inference alone. If it is an inference which must itself be based upon another inference the rule is otherwise, but the evidence here does not present that possibility. (See *United States v. Fleenor*, 162 F. 2d 935, at p. 942.)

Nor is it necessary to prove purpose or intent by direct evidence. Indeed, it is seldom that motive or intent can be proved by any other than circumstantial evidence.

Tedesco v. United States (9th Cir.), 118 F. 2d 737.

At page 741 the Court said:

“Furthermore, the purpose or intent in prosecution for transporting a woman in interstate commerce for immoral purpose may be proved by circumstantial evidence (*Alpin v. United States*, 9 Cir., 41 F. (2d) 495, 496), in which class stands the Bates testimony. And in reaching their conclusion the jury were entitled to consider what Miss Bates did after arriving at her destination. *Kelly v. United States*, 9 Cir., 297 F. 212, 213.”

United States v. Mitchell, 138 F. 2d 831.

C. The appellant appears to rely heavily upon the testimony of Jones and Bryant as to their personal motives and purposes in taking the journey to Mexico (App. Br. 18, 20). The purpose of the victim Jones and the passenger Bryant in making the journey fails to shed any light on appellant's purpose or motive in bringing Jones back from Mexico. Their testimony is immaterial.

Mallory v. United States (9th Cir.), 126 F. 2d 192;

Alpin v. United States (9th Cir.), 41 F. 2d 495, 502.

D. The appellant argues that since the case of *Mortensen v. United States*, cited above, is practically identical, there should be a reversal. In only one material aspect are the two cases similar: In each case we find defendants who probably departed from their homes with the intention of returning within a relatively short period of time (App. Br. 7, 8).

E. Appellant contends that the verdict of "Not Guilty" on Count One of the Indictment compels a similar verdict on Count Two. This contention of appellant fails to contemplate the vagaries of a jury. It is not a correct statement of the law.

Dunn v. United States, 284 U. S. 390.

At page 393 the Court said:

"Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it were a separate indictment. *Latham v. Regina*, 5 Best & S., 635, 642, 643, 122 Eng. Reprint, 968; *Selvester v. United States*, 170 U. S. 262, 42 L. ed. 1029, 18 S. Ct. 580. If separate indictments had been presented against the defendant for possession and for maintain-

ing a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res adjudicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. As was said in *Steckler v. United States* (C. C. A., 2d), 7 F. (2d) 59, 60:

“ ‘The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant’s guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.’

“Compare *Horning v. District of Columbia*, 245 U. S. 135, 65 L. ed. 185, 41 S. Ct. 53.

“That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters.”

So here, the verdict of the jury may be a compromise or may be the result of error, but it nevertheless cannot be upset by appellant’s claim of inconsistency.

F. The appellant urges the Court to take note of the fact that but for the presence of an effective miscegenation statute in California at the time of the trip to Mexico, the appellant and Jones would have been married in California (App. Br. 12). If the purpose of the appellant in taking these steps to marry Jones was to entice her back to prostitution, as the jury apparently found, his act of marrying her would be for a wrongful purpose no matter where performed. This argument is not responsive to the true issue.

There Is Sufficient Evidence to Support the Verdict.

Under the Government's theory that the appellant used the act of marriage as a means of causing Jones to return to prostitution for appellant's benefit, the Government respectfully directs the attention of the Court to the following evidence:

1. That Jones first left appellant in March, 1948, and that appellant forced her to return to him; and that at that time she loved him but also feared him [Rep. Tr. 71-73, 103].

2. That Jones next left the appellant late in March or early in April, 1948, because of physical mistreatment. At that time she had suggested marriage to him several times. That appellant came to her and asked her to come back to him, and asked her to marry him [Rep. Tr. 39, 40, 75, 76]. That at the time of appellant's proposal and during the wedding trip another woman was residing at his house [Rep. Tr. 48, 49].

3. That on the evening of the day of their return from the wedding trip, the appellant urged Jones to return to prostitution [Rep. Tr. 49].

4. That Jones left the appellant again about ten days after the return from Mexico because she was required to work too hard as a prostitute and because of lack of appreciation on the part of appellant and because she was allowed nothing for herself [Rep. Tr. 101].

5. That the appellant was a procurer at times for women other than Jones [Rep. Tr. 34, 35, 36, 48].

6. That Jones was required to turn over all earnings to appellant [Rep. Tr. 37, 38, 100, 101, 102, 104, 105].

7. That Jones was at times detained in the dwelling of the appellant by appellant's implied threat of force against her if she left [Rep. Tr. 54, 55].

The Government contends that from this evidence the jury was permitted to find that the appellant was not the kind of person who could entertain a true appreciation of the significance of marriage, and that his proposal of marriage to Jones and his undertaking of the marriage was merely a device used to cause her to return to him. The appellant knew that Jones desired to marry him, so he made use of that knowledge to entice her back to him. The jury was permitted to find, after a consideration of all the evidence of the appellant's conduct toward Jones, that he cared little for her, and was interested in her primarily as a source of considerable income to himself, and that he exploited her obvious infatuation for him.

Under the Government's theory that the appellant returned Jones to Los Angeles from Mexico for the dominant purpose of putting her immediately back to work as a prostitute for his benefit, the Government respectfully submits the entire testimony elicited at the trial from Jones and Bryant, with particular emphasis on that testimony which reveals that even on his wedding trip the appellant put Jones to work, because he felt the need of more funds [Rep. Tr. 43, 44, 83-86]. And that on the evening of her wedding day the appellant urged Jones to go back to work.

As the appellant contends in his brief, each member of this wedding party may have been returning to Los Angeles because it was their place of residence; however, the only material consideration is the purpose of the appellant in bringing Jones back to Los Angeles. The evidence re-

veals that by the 5th of April, 1948, Jones had been working for the appellant for about two months and was firmly established with a lucrative clientele in a neighborhood well known to the appellant. From this evidence the jury was permitted to find that the dominant purpose of the appellant in returning Jones to Los Angeles was to get her back immediately in her familiar territory among her established patrons in order that she might return to work and replenish appellant's diminishing funds.

The two theories advanced by the Government are not repugnant each to the other; rather, they complement each other. If appellant's purpose in marrying Jones was mercenary, his reason for bringing her back to Los Angeles must have been for the purpose suggested by the Government. The jury might well find that both purposes existed in the mind of the appellant.

Remarks of Government Counsel to the Jury Were Not Prejudicial to the Appellant.

In view of the exceptionally strong evidence against the appellant in this case, remarks by the Government counsel on the failure of appellant to take the witness stand could not have been prejudicial to appellant, since the verdict of the jury would have been the same on this evidence, had the remarks not been made. Assuming that the remarks might have operated to the prejudice of the appellant, at the time they were made, the possibility of prejudice was cured by the instruction given the jury by the Court appearing at line 21 ff., Reporter's Transcript, page 172. Appellant did not raise this objection at time of trial.

The Court Did Not Commit Error in Admitting Into Evidence Certain Testimony Offered by the Government.

The appellant contends that certain testimony of Jones, offered by the Government, was irrelevant and immaterial, and that its admission over appellant's objection was error (App. Br. 31-33). The witness Jones had testified that a certain "Ann" was working for the appellant as a prostitute at the time Jones was initiated into the profession by the appellant. The appellant did not object to this testimony, but did object when the Government asked Jones if she had ever seen Ann give the appellant money. The objection was overruled by the Court, which stated at the time that the question if answered would be proper evidence to prove intent or purpose of the appellant [Rep. Tr. 35, 36].

It is well settled that evidence that a defendant has committed other acts similar to those with which he is charged, is competent evidence to prove intent if the other acts were committed within a reasonable time before or after the act charged. Admissibility of such evidence is a matter within the discretion of the Court.

United States v. Reginelli, 133 F. 2d 595, 598;

Ellis v. United States, 138 F. 2d 612, 614;

United States v. Krulwitch, 145 F. 2d 76, 80;

Neff v. United States, 105 F. 2d 688.

Any objection of the appellant to the failure of the Court to instruct the jury as to the purpose for which the attacked evidence was admitted, is untimely. The appellant submitted no instruction on the topic to the Court,

nor did the appellant request such an instruction at the trial. His objection first appears in his brief. An examination of the transcript [Rep. Tr. 36] reveals that the jury was told the purpose for which the testimony was admitted at the time it was admitted. It is difficult to see how the appellant could be prejudiced by the answer of Jones at this juncture, since she had just previously testified over no objection from the appellant that Ann was working as a prostitute for the appellant.

Conclusion.

The evidence upon which the jury found appellant guilty plainly furnishes adequate support for that verdict. The trial Court committed no reversible error in its rulings, or in its instructions to the jury. Appellant has had a full and fair trial. There is no reason for setting aside the verdict and the lower Court's judgment. The judgment should be affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;

ERNEST A. TOLIN,
Chief Assistant U. S. Attorney;

NORMAN NEUKOM,
Assistant U. S. Attorney;

RAY M. STEELE,
Assistant U. S. Attorney.
Attorneys for Appellee.



No. 12157

United States
Court of Appeals
for the Ninth Circuit

ALEXANDER LAWRENCE ALPERS,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED

FEB 17 1949

PAUL P. O'BRIEN,
CLERK

No. 12157

United States
Court of Appeals
for the Ninth Circuit

ALEXANDER LAWRENCE ALPERS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

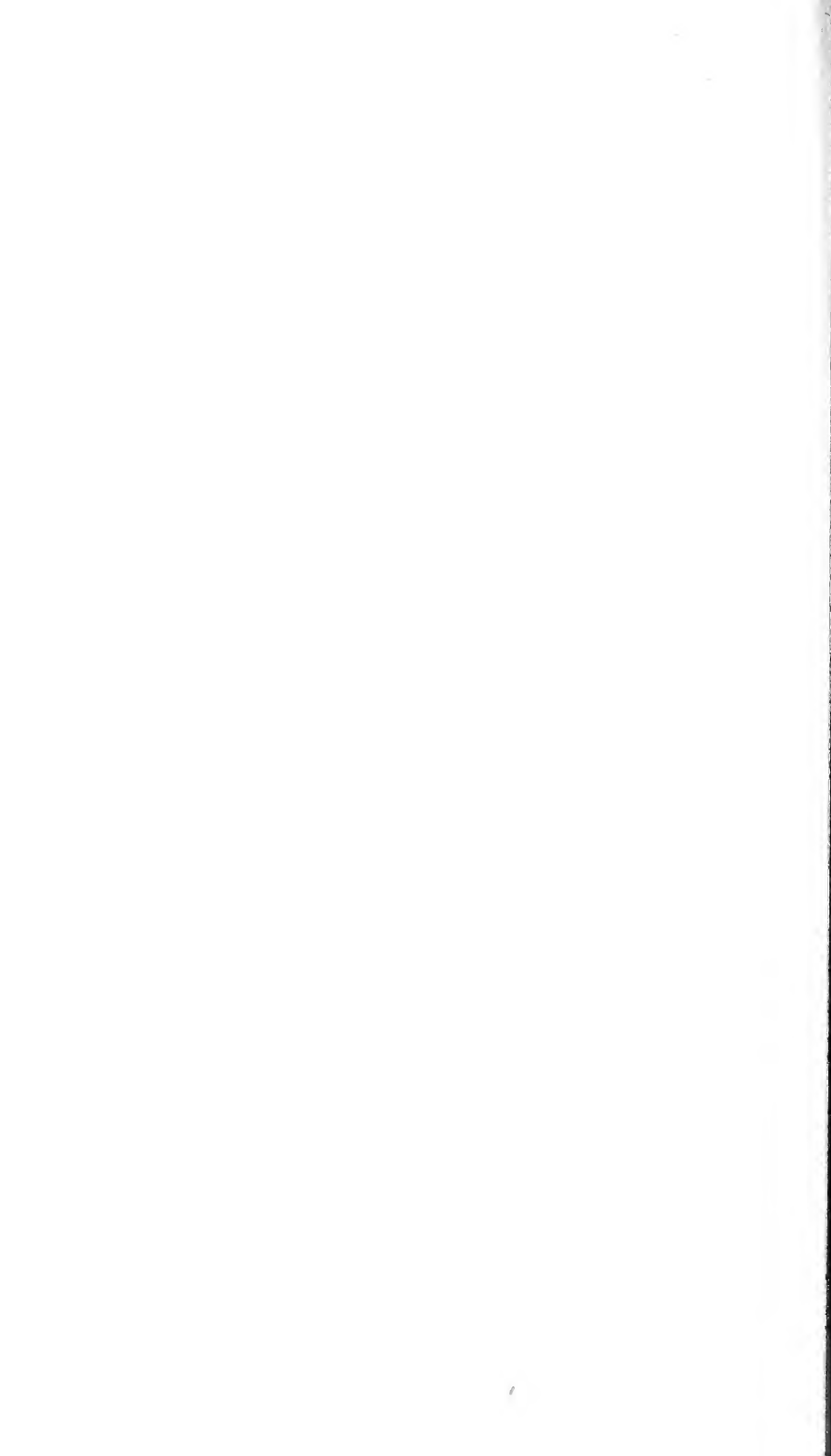
Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | PAGE |
|---|------|
| Appeal: | |
| Certificate of Clerk | 11 |
| Designation of Record on (DC) | 11 |
| Notice of | 9 |
| Statement of Points on (DC)..... | 10 |
| Certificate of Clerk to Transcript of Record on Appeal | 11 |
| Designation of Record on Appeal (DC) | 11 |
| Information | 2 |
| Judgment and Commitment..... | 8 |
| Motion of Defendant to Dismiss Information.. | 5 |
| Minute Order: Arraignment: Motion to Dismiss Information Denied; Plea of Not Guilty..... | 7 |
| Names and Addresses of Attorneys..... | 1 |
| Notice of Appeal | 9 |
| Statement of Points on Appeal (DC)..... | 10 |



NAMES AND ADDRESSES OF ATTORNEYS

HONE & LOBREE,
79 Post Street,
San Francisco, California.

Attorneys for Defendant and Appellant.

FRANK J. HENNESSY,
United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California. [1 *]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court for the
Northern District of California, Southern
Division

No. 31834-R

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALEXANDER LAWRENCE ALPERS,
Defendant.

INFORMATION

(Title 18 USCA Section 396)

First Count:

The United States Attorney charges: That Alexander Lawrence Alpers, (hereinafter referred to as "said defendant"), did, on or about the 28th day of July, 1948, in the City and County of San Francisco, State and Northern District of California, knowingly deposit with an express company, to-wit: Railway Express Agency, for carriage in interstate commerce from the City and County of San Francisco, State of California, to the City of Olympia, State of Washington, a package containing certain matter of an indecent character, to-wit: phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories;

Said package was consigned to The Music Bar, 403 South Washington, Olympia, Washington.

Second Count:

The United States Attorney further charges: That the said defendant did, on or about the 18th day of August, 1948, in the City and County of San Francisco, State and Northern District of California, knowingly deposit with an express company, to-wit: Railway Express Agency, for carriage in interstate commerce from the City and County of San Francisco, State of California, to the City of Dallas, State of Texas, a package containing certain matter of an indecent character, to-wit: phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories;

Said package was consigned to The Blue Bonnet Music Company, 3235 Ross Avenue, Dallas, Texas.

Third Count:

The United States Attorney further charges: That the said defendant did, on or about the 13th day of August, 1948, in the City and County of San Francisco, State and Northern District of California, knowingly deposit with an express company, to-wit: Railway Express Agency, for carriage in interstate commerce from the City and County of San Francisco, State of California, to the City of Olympia, State of Washington, a package containing certain matter of an indecent character, to-wit: phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories;

Said package was consigned to The Music Bar,
403 South Washington, Olympia, Washington.

/s/ FRANK J. HENNESSY,

United States Attorney.

By /s/ DANIEL C. DEASY,

Assistant United States
Attorney.

United States of America,
State and Northern District of California,
Southern Division—ss.

Thomas P. Dowd, Jr., being first duly sworn,
says that he is a Special Agent of the Federal Bu-
reau of Investigation of the United States Depart-
ment of Justice, and as such is familiar with the
facts alleged in the foregoing Information, which
facts are true of his own knowledge.

/s/ THOMAS P. DOWD, JR.

Subscribed and sworn to before me this 22 day
of December, 1948.

(Seal) /s/ C. A. TROLLIST,

Deputy Clerk, U. S. District Court, Northern Dis-
trict of California.

WAIVER OF INDICTMENT

I, the undersigned, Alexander Lawrence Alpers,
named in the foregoing Information, being present
with my counsel in the United States District Court
for the Northern District of California, Southern
Division, at San Francisco, California, and having
been advised of the nature of the charge made
against me in the foregoing Information, and of my
rights, and understanding that the offenses charged

in said Information are felonies, do hereby, in open court, waive prosecution by indictment, and consent to be prosecuted by the foregoing Information instead of by indictment.

Dated: December 22, 1948.

/s/ ALEXANDER LAWRENCE
ALPERS,

Defendant.

/s/ DANIEL C. DEASY,
Witness.

/s/ HASKELL TITCHELL,
Counsel for Defendant.

[Endorsed]: Presented in Open Court and Ordered filed Dec. 22, 1948.

[Title of District Court and Cause.]

MOTION OF DEFENDANT TO DISMISS
INFORMATION

Now comes the defendant and not waiving his right to plead not guilty to the Information heretofore filed herein, moves that the Information be dismissed on the following grounds:

I.

That the Information and each and every part thereof fails to allege facts sufficient to constitute an offense under the laws of the United States.

Wherefore, this defendant prays that his motion be granted and that the Information be dismissed.

HONE & HONE,

By /s/ HASKELL TITCHELL,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 22, 1948.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California, Dec. 22, 1948.

/s/ ALEXANDER LAWRENCE
ALPERS,

Defendant.

HONE & HONE,

By /s/ HASKELL TITCHELL,
Attorneys for Defendant.
/s/ DANIEL C. DEASY,
Assistant United States
Attorney.

Approved:

/s/ MICHAEL J. ROCHE,
Judge, United States District Court, Northern District of California.

[Endorsed]: Filed Dec. 22, 1948.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 22nd day of December, in the

year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

ARRAIGNMENT; MOTION TO DISMISS
INFORMATION DENIED; PLEA OF NOT
GUILTY.

In this case the defendant, Alexander Lawrence Alpers, in open Court, signed a waiver of Indictment. On motion of Daniel C. Deasy, Esq., Assistant United States Attorney, and presenting an Information against Alexander Lawrence Alpers for violation of Title 18 U.S.C.A., Sec. 396, the Court ordered that said Information be filed and made a record of this Court, that bench warrant issue for arrest and appearance of defendant, and that bail for release be fixed in sum of \$1000.00.

The defendant Alexander Lawrence Alpers was present in proper person and with his attorney, H. Titchell, Esq. On motion of Mr. Deasy, the defendant was called for arraignment. The defendant was informed as to the filing of the Information by the United States Attorney, and asked if he was the person named therein, and upon his answer that he was and that his true name was as charged, thereupon Mr. Titchell waived the reading of the Information and copy thereof was handed to him. The defendant stated that he understood the charge against him.

Mr. Titchell made a motion to dismiss Information, which motion, after hearing argument of the attorneys, was ordered denied.

The defendant was then called to plead and there-upon said defendant pleaded "Not Guilty" to the Information filed herein against him, which plea was ordered entered.

With the approval of the Court and consent of the Government, defendant waived trial by jury in writing. After hearing counsel herein, it is ordered that this case be continued to December 23, 1948, for trial.

District Court of the United States for the Northern
District of California, Southern Division

No. 31834-R

UNITED STATES OF AMERICA,

v.

ALEXANDER LAWRENCE ALPERS.

JUDGMENT AND COMMITMENT

On this 23rd day of December, 1948, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of violation of Title 18 USCA., Sec. 396, (Cts. 1 & 2) defendant shipped in interstate commerce, packages containing matter of an indecent character as charged in Cts. 1 & 2 of Information and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine to the United States of America, in the sum of One Hundred Dollars (\$100.00) on Each of Counts One and Two of the Information, making a total fine in the sum of Two Hundred Dollars (\$200.00) and in default of the payment of said, that defendant be imprisoned until payment of said fine or until said defendant is otherwise discharged by law.

Count Three Dismissed.

/s/ MICHAEL J. ROCHE,

United States District Judge.

/s/ J. P. WELSH,

Deputy Clerk.

[Endorsed]: Filed and entered this 23rd day of December, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Alexander Lawrence Alpers, 645 Leavenworth Street, San Francisco, California;

Name and Address of Appellant's Attorney: Hone & Lobree, by Haskell Titchell, 79 Post Street, San Francisco 4, California.

Offense: Violation Title 18 USCA 396 by depositing with Railway Express Company for shipment in interstate commerce packages containing obscene, lewd, lascivious and filthy phonograph records. Two counts.

Statement of Judgment: On December 23, 1948, defendant found guilty on two counts of depositing with Railway Express Company for shipment in interstate commerce of package containing obscene, lewd, lascivious and filthy phonograph records. Defendant fined \$100.00 upon each count.

The above-named appellant hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated: December 30, 1948.

/s/ HONE & LOBREE,

Attorneys for Appellant.

[Endorsed]: Filed Dec. 31, 1948.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The court erred in refusing to dismiss the Information for failure to allege facts sufficient to constitute an offense under the laws of the United States.

2. The court erred in determining that phonograph records were included in and covered by Title 18 USCA 396.

3. That the judgment is void.

Dated: December 30, 1948.

/s/ HONE & LOBREE,

Attorneys for Appellant.

[Endorsed]: Filed Dec. 31, 1948.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

I.

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Information;
2. Defendant's Motion to Dismiss Information;
3. Minute Order of December 22, 1948, denying defendant's motion to dismiss Information;
4. Plea to Information;
5. Waiver of Trial by Jury;
6. Judgment;
7. Notice of Appeal;
8. Statement of Points on which Appellant intends to rely;
9. This Designation.

Dated: December 30, 1948.

/s/ HONE & LOBREE,

Attorneys for Appellant.

[Endorsed]: Filed Dec. 31, 1948.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing documents, listed below, are the originals, or true and correct copy of order entered on the minutes of this

Court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the Appellant.

Information

Motion of Defendant to Dismiss Information.

Waiver of Jury Trial.

Minute Order of December 22, 1948.

Judgment.

Notice of Appeal.

Statement of Points.

Designation of Record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 11th day of January, A.D. 1949.

(Seal)

C. W. CALBREATH,
Clerk.

[Endorsed]: No. 12157. United States Court of Appeals for the Ninth Circuit. Alexander Lawrence Alpers, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 17, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court
of Appeals, Ninth Circuit

No. 12,157

ALEXANDER LAWRENCE ALPERS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S STATEMENT OF POINTS

The points upon which appellant intends to rely and the portion of the record which is material to the consideration of the appeal are the same as those heretofore designated by appellant at the time of filing his Notice of Appeal in this cause and as are specifically set forth in appellant's "Statement of Points" and "Designation of Record" filed in the United States District Court for the Northern District of California, Southern Division, in proceeding numbered 31834-R in the records and files of said court.

Dated: January 27, 1949.

/s/ HONE AND LOBREE,
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed January 27, 1949.

No. 12,157

IN THE
United States Court of Appeals
For the Ninth Circuit

| | |
|----------------------------|-------------------|
| ALEXANDER LAWRENCE ALPERS, | } |
| vs. | |
| UNITED STATES OF AMERICA, | |
| | <i>Appellant,</i> |
| | <i>Appellee.</i> |

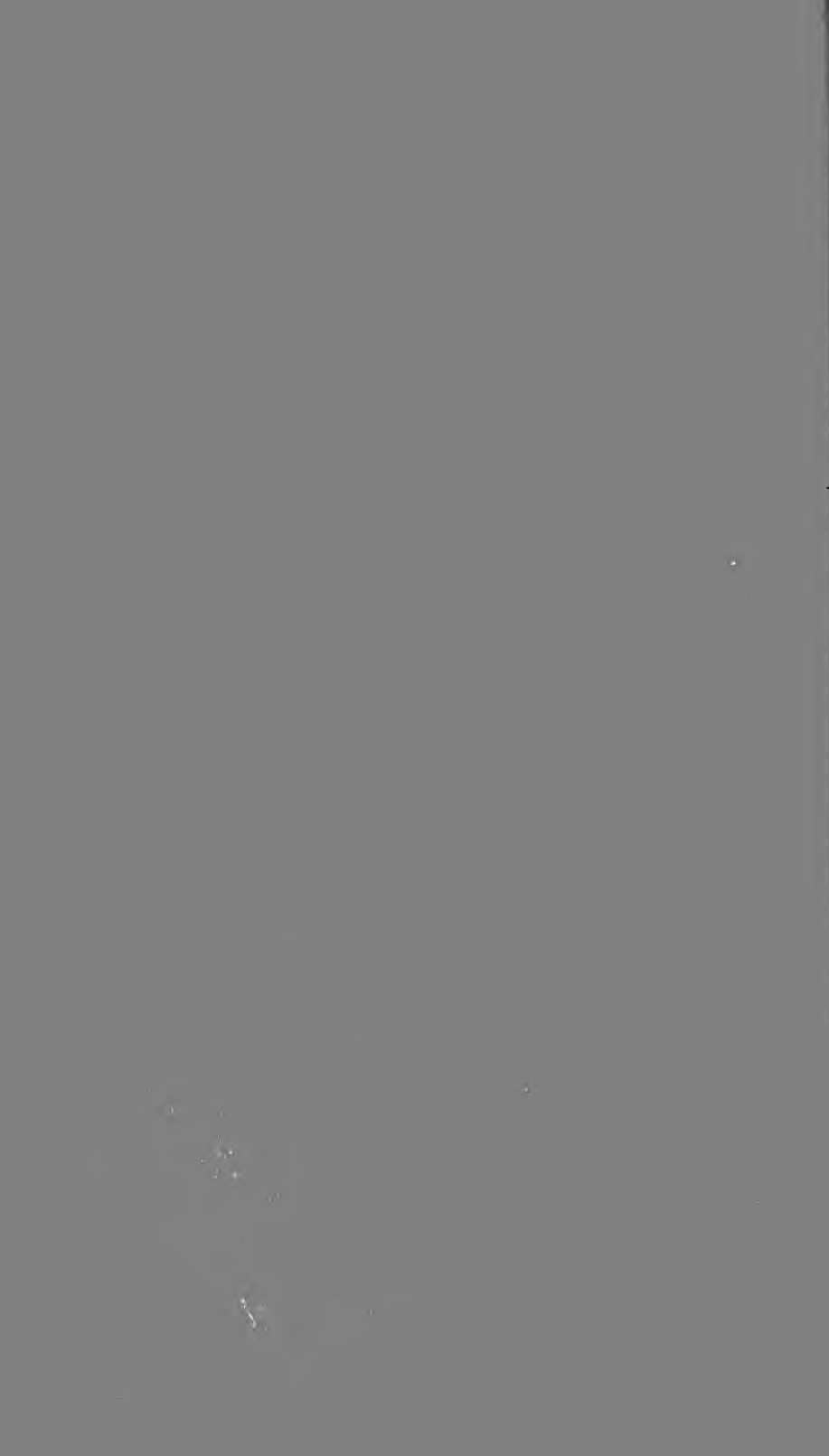
APPELLANT'S OPENING BRIEF.

HONE & LOBREE,
HASKELL TITCHELL,
79 Post Street, San Francisco 4, California,
Attorneys for Appellants.

FILED

MAY 10 1949

PAUL P. O'BRIEN,
CLERK



Subject Index

| | Page |
|---|------|
| Statement of the pleadings and facts disclosing basis of court's jurisdiction | 1 |
| Statutory provisions sustaining jurisdiction of courts..... | 2 |
| Statute involved | 3 |
| Statement of the case | 3 |
| Questions involved | 4 |
| Specification of errors to be relied upon..... | 5 |
| Argument | 5 |

I.

| | |
|---|---|
| Statutes creating crimes may not be extended by intendment because the court thinks the legislature should have made them more comprehensive, as penal statutes must be strictly construed in order that everyone may know his duty plainly and unmistakably under the law..... | 5 |
|---|---|

II.

| | |
|---|---|
| The shipment in interstate commerce of obscene phonograph records is not specifically prohibited by Title 18 U.S.C.A., Section 396, and unless such records are encompassed in the words "or other matter of indecent character" as used therein, the shipment of such records in interstate commerce does not constitute a crime against the United States | 8 |
|---|---|

III.

| | |
|---|---|
| Title 18 U.S.C.A., Section 396, is not an all-inclusive statute. Therefore, the words "or other matter of indecent character" as used therein cannot be construed to prevent the shipment in interstate commerce of every type of obscene matter | 9 |
| A. In amending Title 18 U.S.C.A., Section 396, in 1920, by adding the specific words "motion picture film" Congress demonstrated that this statute was not all-inclusive in scope and that the words "or other matter of indecent character" were not intended to include all types of obscene matter | 9 |

- B. By its enumeration of particular classes of obscene matter Congress evinced a clear intention of limiting the application of the statute and of the general words employed therein 11
- C. The title given by Congress to Title 18 U.S.C.A., Section 396, to-wit: "Importing and Transporting Obscene Books" indicates that the statute is not all-inclusive and that the general words employed therein are to be limited in scope and application..... 12

IV.

- Under the doctrine of ejusdem generis phonograph records, not being of the same species as books, pamphlet, picture, motion picture film, paper, letter, writing, print, are not within the meaning of the words "or other matter of indecent character" as such words are used in Title 18 U.S.C.A., Section 396 14
- A. The doctrine of ejusdem generis is a rule of statutory construction which provides that where general words follow the enumeration of particular classes or specific things, the general words are to be limited in their application to persons and things of the same species or genus as those specifically enumerated 14
 - B. The doctrine of ejusdem generis is particularly applicable to penal statutes..... 15
 - C. Under the doctrine of ejusdem generis where the act deals with specific things or particular modes only, the general words must be limited in their application to things and modes having the same attributes as those enumerated and cannot be extended to things or modes which are merely of a kindred nature..... 16
 - D. Phonograph records are not of the same species as "book, pamphlet, picture, motion picture film, paper, letter, writing, print" and therefore the words "or other matter of indecent character" as used in Title 18 U.S.C.A., Section 396, cannot be construed to prohibit their shipment in interstate commerce..... 18
- Conclusion 21

Table of Authorities Cited

| Cases | Pages |
|--|--------|
| Denver v. Taylor, 292 Pac. 594 | 17 |
| Erbaugh v. U. S. (CCA-8), 173 Fed. 433..... | 7 |
| Ex parte Webb, 225 U. S. 663 | 7 |
| First National Bank of Anamoose v. U. S. (CCA-8), 206 Fed. 374 | 7, 15 |
| Goodcell v. Graham (CCA-9), 35 Fed. (2d) 586..... | 12 |
| Harrison v. Vore, 50 U. S. 372 | 6 |
| Holy Trinity Church v. U. S., 13 U. S. 457..... | 12 |
| In re Barre Water Co., 62 Vt. 27 | 17 |
| In re Bush Terminal (CCA-2), 93 Fed. (2d) 659..... | 12, 17 |
| Parkman v. Lemmon, 119 Kan. 323, 44 A.L.R. 1500..... | 17 |
| People v. McKean, 76 Cal. App. 114 | 18 |
| People v. Powell (Mich.), 274 N. W. 372, 111 A.L.R. 721.. | 16 |
| Resnick v. Boyd, 99 Pa. 555 | 18 |
| Smitkin v. U. S. (CCA-7), 265 Fed. 489..... | 8 |
| Speeter v. U. S. (CCA-8), 42 Fed. (2d) 937..... | 7 |
| State of Missouri v. Wilson, 166 S. W. (2d) 499..... | 17 |
| U. S. v. Board of Commissioners (Dist. Ct. N.D. Okla.), 26 Fed. Supp. 270 | 10 |
| U. S. v. Chase, 135 U. S. 255 | 10 |
| U. S. v. Katz, 271 U. S. 354 | 12 |
| U. S. v. Salem, 235 U. S. 237 | 15 |
| U. S. v. Southern Pacific (Dist. Ct. S.D. of Cal. N.D.), 230 Fed. 270 | 10 |
| U. S. v. Steever, 222 U. S. 167 | 18 |
| U. S. v. Weitzel, 246 U. S. 533 | 6 |
| U. S. v. Wiltberger, 18 U. S. 76 | 6, 16 |

| Codes | Pages |
|---|---------------------------|
| 18 U.S.C.A., Section 334 | 13, 14 |
| 18 U.S.C.A., Section 396 | 1, 3, 4, 8, 9, 12, 13, 18 |
| 28 U.S.C.A., Section 41, subdivisions 2 and 8 | 2 |
| 28 U.S.C.A., Section 225, subdivisions (a) first and third and subdivision (d) | 2 |

Rules

| | |
|---|---|
| Rules of Criminal Procedure, Rules 37 and 39..... | 2 |
|---|---|

No. 12,157

IN THE

**United States Court of Appeals
For the Ninth Circuit**

| | |
|----------------------------|---|
| ALEXANDER LAWRENCE ALPERS, | } |
| <i>Appellant,</i> | |
| VS. | |
| UNITED STATES OF AMERICA, | } |
| <i>Appellee.</i> | |

APPELLANT'S OPENING BRIEF.

**STATEMENT OF THE PLEADINGS AND FACTS DISCLOS-
ING BASIS OF COURT'S JURISDICTION.**

This is an appeal by Alexander Lawrence Alpers, defendant in the District Court, from a judgment of conviction (R. 8, 9) on Counts One and Two of an Information (R. 2, 3, 4) following a trial by the court sitting without a jury. Each of the above counts charged appellant with a separate violation of Title 18 U.S.C.A., Section 396, consisting of knowingly depositing with the Railway Express Agency, for carriage in interstate commerce, certain obscene phonograph records.

The appellant waived indictment (R. 4, 5) and was prosecuted by Information as above stated. The ap-

pellant moved to dismiss the Information (R. 5) before arraignment and the motion after argument and hearing was denied. (R. 7.) The defendant pleaded "Not Guilty" to the charges preferred against him (R. 8), and waived trial by jury. (R. 6.) Thereafter the United States presented its case to the court, at the conclusion of which appellant made an oral motion for dismissal which was denied. The court then found appellant guilty on Counts One and Two, Count Three having been dismissed. The court fined appellant \$100.00 on each of Counts One and Two. (R. 8, 9.) The appellant thereafter filed his notice of appeal (R. 9, 10) from the judgment and fines.

STATUTORY PROVISIONS SUSTAINING JURISDICTION OF COURTS.

The District Court below had jurisdiction of this case by virtue of Title 28 U.S.C.A., Section 41, subdivisions 2 and 8, and the appeal was taken to this court under Rules 37 and 39 of the Rules of Criminal Procedure for the District Courts of the United States.

This court has jurisdiction upon appeal to review the judgment of the District Court below by virtue of the provisions of Title 28 U.S.C.A., Section 225, subdivisions (a) first and third and subdivision (d).

The pleadings necessary to show the existence of the jurisdiction are the Information (R. 2, 3, 4), the plea of not guilty (R. 8) and the judgment sen-

tence and fines. (R. 8, 9.) The facts disclosing the basis of the jurisdiction of the court below in the initial trial and the jurisdiction of this court to review that judgment are set out in the statement of the case herein.

STATUTE INVOLVED.

The applicable part of Title 18 U.S.C.A., Section 396, reading as follows:

TITLE 18 USCA, Section 396: "Whoever shall * * * knowingly deposit or cause to be deposited with any express company or other common carrier for carriage from one State, Territory or District of the United States * * * to any other State, Territory or District of the United States * * * any obscene, lewd or lascivious, or any filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of an indecent character * * *"

STATEMENT OF THE CASE.

The facts of this case are as set forth in the Information. Appellant knowingly deposited with the Railway Express Agency for carriage in interstate commerce from San Francisco, California, to Olympia, Washington, and to Dallas, Texas, a package containing certain obscene phonograph records. Appellant waived indictment and was charged by Information. Appellant also waived trial by jury, was

found guilty and fined as hereinbefore set forth and appealed from said judgment.

QUESTIONS INVOLVED.

The sole issue upon this appeal is whether or not phonograph records are within the purview of the words "or other matter of indecent character" as such words are used in Title 18 U.S.C.A., Section 396, the applicable part of which appears heretofore.

To assist the court in arriving at its decision as to the proper determination of this issue, the following sub-issues will be hereinafter discussed:

1. May statutes creating crimes be extended by intendment?

2. Is the shipment in interstate commerce of obscene phonograph records specifically prohibited by Title 18 U.S.C.A., Section 396?

3. Is Title 18 U.S.C.A., Section 396, an all-inclusive statute and do the words "or other matter of indecent character" include all types of obscene matter?

4. May the words "or other matter of indecent character" be interpreted to include phonograph records under the rule of *ejeusdem generis*?

SPECIFICATION OF ERRORS TO BE RELIED UPON.

1. The trial court erred in denying appellant's motion to dismiss the Information.

2. The trial court erred in finding the appellant guilty on Counts One and Two of the Information. (R. 8, 9.)

3. The finding of the trial court and the entry of judgment and sentence on Counts One and Two of the Information are void for each of said counts fails to state facts sufficient to constitute a crime against the United States, to-wit, that the shipment in interstate commerce of obscene phonograph records is not prohibited by any law of the United States.

ARGUMENT.

I.

STATUTES CREATING CRIMES MAY NOT BE EXTENDED BY INTENDMENT BECAUSE THE COURT THINKS THE LEGISLATURE SHOULD HAVE MADE THEM MORE COMPREHENSIVE, AS PENAL STATUTES MUST BE STRICTLY CONSTRUED IN ORDER THAT EVERYONE MAY KNOW HIS DUTY PLAINLY AND UNMISTAKABLY UNDER THE LAW.

Penal statutes are to be strictly construed in favor of the accused. The law zealously guards the rights of the individual no matter how much it may abhor his conduct. Under our system of law, no matter what the conduct of an individual may be, no matter how much we may feel that such conduct should be punished, the courts cannot punish that conduct un-

less it has been specifically delineated as a crime within the meaning and intendment of the statutes.

U. S. v. Wiltberger, 18 U.S. 76:

“From this review of the examination made of the act at bar it appears that the argument chiefly relied upon to prove that the words of one section descriptive of the place ought to be incorporated into another is the extreme improbability that Congress could have intended to make these differences with respect to place that their words import. We admit that it is extremely improbable, but probability is not a guide which a court in construing a penal statute may safely take. We can conceive no reason why other crimes which are not comprehended in this act should not be punished but Congress has not made them punishable, and this court cannot enlarge upon the Statute.”

U. S. v. Weitzel, 246 U.S. 533 (to same effect).

Just as an accused is entitled to be acquitted of a charge unless there is proof beyond a reasonable doubt of his guilt upon the facts, so must an accused be dismissed if there is any reasonable doubt as to whether or not the acts he has committed constitute a crime.

Harrison v. Vore, 50 U.S. 372:

“In the construction of a penal statute all reasonable doubt concerning its meaning should operate in favor of the defendant.”

Ex Parte Webb, 225 U. S. 663:

“A law creating a crime ought to be explicit and if ambiguous or uncertain it should be interpreted in favor of the liberty of the citizen.”

Also:

Speeter v. U. S. (CCA-8), 42 Fed. (2d) 937;

Erbaugh v. U. S. (CCA-8), 173 Fed. 433.

While we may not approve of the conduct of the appellant in this instance, if there is reasonable doubt as to whether his conduct is prohibited by statute, that doubt must be resolved in favor of the accused. However much this court may regret that Congress has not enacted proper legislation, it cannot, under all the rules of law which must guide it in reaching its decision, add to the law something that does not exist therein and by *ex post facto* construction make a crime of acts not prohibited by statute, however morally wrong they may be. To do so would be to countenance and to encourage the breach of fundamental legal principles which would prove more harmful to society generally in the long run than the actions of the appellant have in this specific instance.

First National Bank of Anamoose v. U. S.
(CCA-8), 206 Fed. 374:

“An act which was not clearly an offense by the expressed will of the Legislature before it was done, may not be lawfully or justly made so by construction after it is committed, either by interpretation or expression or by the expunging of its words by the judiciary. *Ex post facto* construction is as vicious as *ex post facto* legislation.”

The principle of strict construction has found universal sanction in our administration of the law. The reason for its adoption and the adherence to it by the courts is well set forth in the case of *Smitkin v. U. S.* (CCA-7), 265 Fed. 489, at 494, where the court said:

“Federal crimes exist only by virtue of Federal statutes, but the law making power is continuous. Congress can and does change, revise, substitute, amend and repeal at its will. Citizens and subjects are not consulted, and have no direct voice in choosing the phraseology. This situation has led to the universal adoption of the rule that penal statutes are to be strictly construed. This is a fundamental principle which, in our judgment, will never be altered. Why? Because the law making body owes the duty to citizens and subjects of making unmistakably clear those acts for the commission of which the citizen or subject may lose his life or liberty. * * * The burden lies on the lawmakers, and inasmuch as it is within their power, it is their duty to relieve the situation of all doubts.”

With these thoughts in mind we feel that in following the arguments hereinafter set forth, the court, no matter how reluctant it may be to do so, must come to the conclusion that the shipment of obscene phonograph records in interstate commerce does not, at present, constitute a crime against the United States.

II.

THE SHIPMENT IN INTERSTATE COMMERCE OF OBSCENE PHONOGRAPH RECORDS IS NOT SPECIFICALLY PROHIBITED BY TITLE 18 U.S.C.A., SECTION 396, AND UNLESS SUCH RECORDS ARE ENCOMPASSED IN THE WORDS "OR OTHER MATTER OF INDECENT CHARACTER" AS USED THEREIN, THE SHIPMENT OF SUCH RECORDS IN INTERSTATE COMMERCE DOES NOT CONSTITUTE A CRIME AGAINST THE UNITED STATES.

A simple reading of Title 18 U.S.C.A., Section 396 (ante, p. 3) clearly shows that the shipment in interstate commerce of obscene phonograph records is not specifically prohibited thereby. It follows, therefore, that it is only if phonograph records are within the meaning and intendment of the words "or other matter of indecent character", as such words are used in said statute, that the shipment thereof in interstate commerce constitutes a crime against the United States.

 III.

TITLE 18 U.S.C.A., SECTION 396, IS NOT AN ALL-INCLUSIVE STATUTE. THEREFORE, THE WORDS "OR OTHER MATTER OF INDECENT CHARACTER" AS USED THEREIN CANNOT BE CONSTRUED TO PREVENT THE SHIPMENT IN INTERSTATE COMMERCE OF EVERY TYPE OF OBSCENE MATTER.

- A.** In amending Title 18 U.S.C.A., Section 396, in 1920, by adding the specific words "motion picture film" Congress demonstrated that this statute was not all-inclusive in scope and that the words "or other matter of indecent character" were not intended to include all types of obscene matter.

A review of the legislative history of Title 18 U.S.C.A., Section 396, reveals that this section was amended in 1920 by Congress to provide for the addi-

tion of the words "motion picture film" to the list of matter expressly and specifically forbidden by the statute. When the Legislature amends a statute it must be presumed that some change was intended.

U. S. v. Chase, 135 U.S. 255:

"An amendment was passed on September 26, 1888. For the first time in the history of the postal service the word 'letter' was included in the list of articles non-mailable by reason of being obscene * * * If letters were embraced in the statute upon which the indictment is founded why did Congress consider it necessary to insert the specific word to designate them in 1888? It must be that that body did not put the construction on the prior statute claimed in behalf of the United States else we would have it doing a vain and useless act."

U. S. v. Board of Commissioners (Dist. Ct. N.D. Okla.), 26 Fed. Supp. 270;

U. S. v. Southern Pacific (Dist. Ct. S.D. of Calif. N.D.), 230 Fed. 270.

What change was made by Congress in 1920? It could only have been the adding of something to the statute that had not existed therein before, the prohibition of something that had not been prohibited before. Paraphrasing the language of the *Chase* case cited above it could only have been that that body did not believe motion picture film was covered by the statute before, else we would have it doing a vain and useless act. At the time of this amendment the words "or other matter of indecent character" were an integral part of the statute. Were these general words

considered by Congress to be unrestricted in scope and application no amendment would have been made or required, because no amendment could have added anything to the statute. Therefore, when Congress did amend the statute to specifically cover motion picture film it unmistakably indicated that it did not believe the words "or other matter of indecent character" were all-inclusive in nature and covered every type of obscene matter. Congress further demonstrated that certain types of obscene matter were outside of the scope and intendment of the statute and of the general words employed therein.

B. By its enumeration of particular classes of obscene matter Congress evinced a clear intention of limiting the application of the statute and of the general words employed therein.

Where a statute employs specific words enumerating specific classes, modes or species, the statute should be construed as being limited in operation and not all-inclusive in scope. This principle of limitation attaches to the general words as well as to the specific enumeration. It is based upon the sound reason that if the legislature had intended the statute to be unrestricted in scope and the general words to be universal in application, it would have made no mention of special classes or things at all, but would only have employed general words such as "all persons who" or "any obscene or indecent matter." It is upon this sound and logical basis that the rule of *ejusdem generis* (infra) is founded.

In re Bush Terminal (CCA-2), 93 Fed. (2d) 659:

“The rule of *ejusdem generis* is based upon the theory that if the Legislature had intended general words to be used in their unrestricted sense, it would have made no mention of particular classes.”

- C. The title given by Congress to Title 18 U.S.C.A., Section 396, to-wit: “Importing and Transporting Obscene Books” indicates that the statute is not all-inclusive and that the general words employed therein are to be limited in scope and application.

While the title given to an act is not necessarily controlling, it may be looked to by the courts as an aid in interpreting and construing the statute and in determining the true intention of the Legislature in its enactment.

Goodcell v. Graham (CCA-9), 35 Fed. (2d) 586:

“The title of the section can be referred to for determining the proper interpretation of the section.”

Holy Trinity Church v. U. S., 13 U.S. 457;

U. S. v. Katz, 271 U.S. 354.

The particular act in question is entitled “Importing and Transporting Obscene Books”, a title which reveals that the act was designed specifically to restrict the transportation of obscene literature and that it was not intended to be all-inclusive in scope. This fact is underlined by an examination of the companion act which prohibits the transportation of obscene matter

in the mails. This latter section, Title 18 U.S.C.A., Section 334, bears the general title "Mailing Obscene Matter." This disparity in title is not accidental. The language employed in the substantive portions of Section 334 is far broader and much more comprehensive than the language employed in Section 396.

Title 18 U.S.C.A. has been recodified and revised. This monumental and exhaustive revision took five years of detailed study. It was completed and approved by Congress in 1948. The legislative history of this recodification and revision reveals that every part of each statute was given consideration, that language was changed, that titles were changed and that the arrangement of the sections within the code were reorganized. The legislative history further shows that each section was reviewed and examined, and re-reviewed and re-examined to the end that each section would clearly express in straightforward, easily understandable language its true intent, purpose and scope.

In the revised and recodified Title 18 former Sections 334 and 396 were placed one after the other in Chapter 71. Former Section 334 was renumbered Section 1461 and its title changed to read "Mailing obscene or crime inciting matter." Former Section 396 was renumbered Section 1462. The entire language of this section was modified and simplified. Its title was also changed. The title of this section now reads "Importation or transportation of obscene literature." It should be specifically noted that while revising the title to this section, Congress did not choose to use

the same general language applied by it to former Section 334. It would have been a simple matter for Congress to have made the title "Importation or transportation of obscene matter" had it felt this statute was general in application. It did not do so. Thus, it logically appears that Congress did not intend this section to be all-inclusive and that it never considered it to be so.

IV.

UNDER THE DOCTRINE OF EJUSDEM GENERIS PHONOGRAPH RECORDS, NOT BEING OF THE SAME SPECIES AS BOOKS, PAMPHLET, PICTURE, MOTION PICTURE FILM, PAPER, LETTER, WRITING, PRINT, ARE NOT WITHIN THE MEANING OF THE WORDS "OR OTHER MATTER OF INDECENT CHARACTER" AS SUCH WORDS ARE USED IN TITLE 18 U.S.C.A., SECTION 396.

- A. The doctrine of ejusdem generis is a rule of statutory construction which provides that where general words follow the enumeration of particular classes or specific things, the general words are to be limited in their application to persons and things of the same species or genus as those specifically enumerated.**

The principle of *ejusdem generis* is one of basic importance in the law of statutory construction. In practical application it simply means that where there is a specific enumeration of persons or things of the same class or species followed by a clause embracing "other" or "any" persons or things, the general words "other" or "any" are read as "other such

like” or “any such like” and not as though they were unrestrictive in operation and effect.

U. S. v. Salem, 235 U. S. 237;

First National Bank of Anamoose v. U. S.
(CCA-8), 206 Fed. 374.

The reason for the rule, as pointed out heretofore, is simply that if the general words of the statute were intended to prevail in their unrestricted and full sense, special words would not have been used at all.

B. The doctrine of ejusdem generis is particularly applicable to penal statutes.

Because penal statutes should be strictly construed in favor of the accused, the courts have universally held that the doctrine of *ejusdem generis* is particularly applicable to the construction of penal statutes.

First National Bank of Anamoose v. U. S. (CCA-8), 206 Fed. 374:

“The rule that where general words follow the enumeration of particular classes of persons or acts the general words should be construed to apply to persons or acts of the same general nature or class as those enumerated, is particularly applicable to statutes defining crimes and regulating their punishment.”

U. S. v. Salem, 235 U. S. 237:

“The meaning of words is affected by their context and words in a highly penal statute will be interpreted in a narrower sense as referring to things of the same nature as those described in an enumerated list, although standing alone they might have a wider meaning.”

- C. Under the doctrine of *ejusdem generis* where the act deals with specific things or particular modes only, the general words must be limited in their application to things and modes having the same attributes as those enumerated and cannot be extended to things or modes which are merely of a kindred nature.

In the application of the doctrine of *ejusdem generis* it is not enough that the matter complained of be of a kindred character with that sought to be legislated against. Where the statute deals in specific things or particular modes, the general words can be applied and extended only to those things or modes which have the same attributes as the things or modes listed in the statute.

People v. Powell (Mich.), 274 N.W. 372, 111 A.L.R. 721:

“It is a well settled general rule and one specifically applicable in the interpretation of statutes which define crimes, that general words are to be restrained to the matter with which the act is dealing, and if dealing with specific things or particular modes only, the general words must be limited to such things or modes.”

U. S. v. Wiltberger, 18 U. S. 76:

“The principle that a case which is within the reason or mischief of a statute is within its provisions will not be carried so far as to punish a crime not enumerated in the statute because it is of equal atrocity or of a kindred character with those which are enumerated.”

A survey of a few of the cases which have been decided in various jurisdictions concretely shows the

application of this principle. In *Parkman v. Lemon*, 119 Kansas 323, 44 A.L.R. 1500, the court held that a shotgun, although a dangerous weapon, was not within the meaning of the words "or other dangerous weapons" as used in a statute which provided "Any person who shall sell, trade, give, loan or otherwise furnish any pistol, revolver or toy pistol by which cartridges may be exploded, or any dirk, bowie knife, brass knuckles, slung shot or other dangerous weapon" on the grounds that *all of the specifically enumerated weapons were hand weapons* normally designed for use in self-defense and for secretion on the person, and that therefore *dangerous weapons not of such class or species* were not to be construed as being within the general language of the statute under the doctrine of *ejusdem generis*.

In the case of *In re Bush Terminal Co.* (CCA-2), 93 Fed. (2d) 659, the court held that under the rule of *ejusdem generis* the words "*other combustibles*" as used in the New York City personal property tax imposing a tax on "oil, gas, gasoline and other combustibles" did not include coal and that coal was not taxable notwithstanding the fact that it was a *combustible*.

The list of examples could be extended by citations from almost every jurisdiction. The underlying principle would always be the same.

State of Missouri v. Wilson, 166 S.W. (2d) 499;

Denver v. Taylor, 292 Pac. 594;

In re Barre Water Co., 62 Vt. 27;

Resnick v. Boyd, 99 Pa. 555;

People v. McKean, 76 Cal. App. 114;

U. S. v. Steever, 222 U. S. 167.

- D. Phonograph records are not of the same species as "book, pamphlet, picture, motion picture film, paper, letter, writing, print" and therefore the words "or other matter of indecent character" as used in Title 18 U.S.C.A., Section 396, cannot be construed to prohibit their shipment in interstate commerce.

There are two distinct species of obscene matter—*visual representations* and *auditory representations*. These two distinct, prime classes, represent the two means whereby obscene material may be communicated to the human mind. Within these two major classifications are various sub-classifications which are based upon any number of minor distinctions, such as whether the representation is graphic or lingual, whether the representation is designed for permanence of impression or is transitory in nature, whether the representation may be used with or without mechanical assistance. Whatever the minor sub-classification may be, however, all obscene representations must fit into one or the other of the two prime classes—they must either be *visual representations* or *auditory representations*.

Prior to 1920 all of the types of representation enumerated in Title 18 U.S.C.A., Section 396, fell within the broad classification of *visual representations*. The listed types of matter, "book, pamphlet, picture, paper, letter, writing and print" covered graphic and lingual representations of visual matter.

They were also permanent in nature. But all visual representations were not *ejusdem generis* with these items, for all these items possessed one further quality which set them apart as a distinct sub-species—they all could be read, seen and studied without the aid of any mechanical contrivance. When Congress amended the statute in 1920 to include the specific words “motion picture film” it indicated, as we have seen (Par. II, A., ante), that it did not believe that motion picture film was *ejusdem generis* with the specific items listed in the statute, and that it was covered thereby. While motion picture film belonged to the broad classification of *visual representation* it also had a special quality which distinguished it as a distinct sub-species—it required a mechanical device to enable it to be seen and observed. Since none of the enumerated articles were of this sub-species, it was necessary for Congress to add motion picture film to the statute by the use of specific language. By this amendment Congress did more than add mere motion picture film to the statute. Congress also added the important sub-species of visual representations which could only be used with the aid of mechanical devices, for other forms of visual representation requiring such devices would be *ejusdem generis* with motion picture film. By the addition of this sub-species the statute was extended to include all forms of visual representation. But the statute was not extended to include anything outside of the sphere of visual representation. All of the specifically enumerated articles still fell within this large, general classification.

Phonograph records are *auditory representations*. They belong to the second of the two broad species of obscene representations. Not being of the same species as any of the matter listed in the statute the words "or other matter of indecent character" cannot, under the doctrine of *ejusdem generis*, be extended by any strained construction to include phonograph records. Certainly, if it was necessary to amend the statute in 1920 to cover a sub-species of visual representation closely allied to the specific visual items then listed in the statute, it seems apparent that the statute should not be construed to include phonograph records which belong to a completely different species altogether.

The fact that phonograph records are not within the purview of the statute can be proven with almost mathematical certainty. We know that there are two means of conveying obscene matter to the human mind by visual or auditory representation. We know that with the amendment of 1920 the statute now covers all forms of visual representation either directly or under the doctrine of *ejusdem generis*. We know that the statute is not all-inclusive. We also know that if phonograph records are construed to be within the purview of the statute, under the doctrine of *ejusdem generis* all other forms of sound reproduction must also be construed to be within the statute. Thus, all means of auditory and visual representation would be covered. The statute would become all inclusive. But we know this cannot be true.

Therefore, since it is only by construction that we can read into the statute the words "phonograph records", and since such construction would be opposed to and irreconcilable with that which we definitely know is true about the statute, we must come to the conclusion that the words "or other matter of indecent character" cannot be construed to include phonograph records, and that phonograph records are not within the meaning and intendment of the statute.

CONCLUSION.

It is respectfully submitted that the District Court below erred in refusing to grant appellant's motion to dismiss the Information and that the judgment of the said court is void on the grounds that the shipment of obscene phonograph records in interstate commerce does not constitute a crime against the United States.

Dated, San Francisco, California,
March 9, 1949.

Respectfully submitted,
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No. 12,157

IN THE

United States Court of Appeals
For the Ninth Circuit

ALEXANDER LAWRENCE ALPERS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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Subject Index

| | Page |
|--------------------------------|------|
| Jurisdictional statement | 1 |
| Statement of the case | 1 |
| Statute involved | 2 |
| Questions involved | 2 |
| Argument | 3 |

I.

| | |
|--|---|
| Appellant's argument that, since phonograph records are not specifically mentioned in the statute, their shipment in interstate commerce is not an offense, unless such records are encompassed in the words "Or Other Matter of Indecent Character" is without merit..... | 4 |
| A. What classes of things are specifically enumerated in the statute? | 5 |
| B. Phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories are "prints" within the meaning of the term as used in the statute | 7 |

II.

| | |
|---|----|
| Even if the objects deposited for carriage in interstate commerce are not within the class of things embraced in the term "print" as used in the statute, they are nevertheless included in the term "Other Matter of Indecent Character" | 8 |
| A. The doctrine of ejusdem generis requires only that the general words employed in the statute be construed to apply to things of the same general class or nature as those enumerated | 8 |
| B. Phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and stories belong to the same general class as the objects specifically enumerated in the statute..... | 9 |
| C. Appellant's argument that phonograph records are not in the same general class as the enumerated objects is erroneous | 10 |
| Conclusion | 12 |

Table of Authorities Cited

| Cases | Pages |
|--|--------------|
| First National Bank of Anamoose v. U. S., 206 Fed. 374 (CCA-8) | 8 |
| Statutes | |
| !Title 18 U.S.C.A., Section 396 | 2, 3 |
| Other Authorities | |
| New Standard Dictionary of the English Language (Funk & Wagnalls, 1924) | 6, 7 |
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No. 12,157

IN THE
United States Court of Appeals
For the Ninth Circuit

| | |
|----------------------------|---------------------|
| ALEXANDER LAWRENCE ALPERS, | } <i>Appellant,</i> |
| VS. | |
| UNITED STATES OF AMERICA, | } <i>Appellee.</i> |

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The appellee joins in the statements made in appellant's opening brief as to the pleadings, the jurisdiction of the District Court of the United States for the Northern District of California, Southern Division, to try this case, and the jurisdiction of this Honorable Court to consider the pending appeal from the District Court's judgment of conviction. (Appellant's Opening Brief, pp. 1, 2 and 3.)

STATEMENT OF THE CASE.

The facts of this case are as set forth in the first two counts of the information. Appellant knowingly

deposited with an express company, to-wit, Railway Express Agency, for carriage in interstate commerce from San Francisco, California, to Olympia, Washington, and to Dallas, Texas, respectively, "a package containing certain matter of an indecent character, to-wit, phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories". (Tr. pp. 2 and 3.)

In his opening brief appellant concedes that he is guilty of the charges made against him in the information, but argues that the information fails to charge an offense against the laws of the United States, and for that reason the judgment of conviction must be reversed.

STATUTE INVOLVED.

The statute under which appellant was charged in the information is Title 18 U.S.C.A. §396, the pertinent portions of which are quoted in appellant's opening brief, page 3.

QUESTIONS INVOLVED.

We do not agree with appellant's statement of the questions involved upon this appeal.

As set forth on page 4 of his opening brief, appellant's statement of the issue is too narrow and his statement of so-called sub-issues is too broad.

The sole issue involved upon this appeal is whether or not the depositing for carriage in interstate commerce, of "phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories" is made an offense against the United States by Title 18 USCA §396, which prohibits the depositing for carriage in interstate commerce, of "any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of an indecent character".

The only question to be decided upon this appeal is this:

"Do the phonograph records involved in this case constitute objects included in one of the classes of things enumerated in the statute?"

ARGUMENT.

We do not take issue with any of the general principles of law referred to in appellant's brief. We agree with him that criminal statutes should not be extended by intendment simply because the Court thinks the legislature should have made them more comprehensive, and we concede that the doctrine of *ejusdem generis* is particularly applicable to penal statutes.

We do not ask this Honorable Court to extend the application of the statute to any objects not embraced within the plain meaning of the words employed by the Congress.

We submit that a comparison of the language of the information with the language of the statute, giving to the words used in each instance their ordinary meaning, in the light of the context, will demonstrate that the information charges a violation of the statute involved in this case, and that the appellant was properly convicted of an offense against the United States.

I.

APPELLANT'S ARGUMENT THAT, SINCE PHONOGRAPH RECORDS ARE NOT SPECIFICALLY MENTIONED IN THE STATUTE, THEIR SHIPMENT IN INTERSTATE COMMERCE IS NOT AN OFFENSE, UNLESS SUCH RECORDS ARE ENCOMPASSED IN THE WORDS "OR OTHER MATTER OF INDECENT CHARACTER" IS WITHOUT MERIT.

If the objects deposited for carriage in interstate commerce come within one of the classes specifically enumerated in the statute, or under the doctrine of *ejusdem generis*, are "other matter of indecent character" of the same general nature or kind as objects of the classes specifically enumerated, then their deposit, for carriage in interstate commerce, comes within the prohibition of the statute.

Appellant's argument states as a premise that the objects involved are not within one of the classes of things specifically enumerated. We think this premise is false, and hence the whole argument leads to a false conclusion.

A. What classes of things are specifically enumerated in the statute?

The statute enumerates "book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of indecent character".

In order to determine the precise meaning of this language as used by the Congress, it is necessary to ascribe to the words employed their ordinary meanings, excluding such meanings as would make any of the words synonymous with one another.

It is clear from the language used that the statute applies to all indecent books, pamphlets, magazines, newspapers, manuscripts, letters, and other papers and writings, also to all indecent paintings, lithographs, drawings, photographs, engravings and other pictorial representations of persons or things. All these are embraced in the ordinary meaning of the words "*book, pamphlet, picture, paper, letter, writing*".

The statute (by amendment in 1920) includes "*motion picture film*" as a separate class by itself, Congress presumably considering it more than a "picture".

The statute also includes "*print*" as a class.

The word "*print*" is defined as:

"A mark made by impression; a line, character, figure, or indentation, made by pressure of one thing on another—

A stamp or die for molding or impressing an ornamental design upon an object—

That which receives an impression, as from a stamp or mold;

An impression taken from anything." (Emphasis added.)

Webster's New International Dictionary of the English Language (G. & C. Merriam Company, 1924).

Also:

"An impression or mark made upon or sunk into a substance by pressure; imprint—

A reproduction from such an impression—

That which bears the impression of a stamp—

Any pattern used in stamping, etc." (Emphasis added.)

New Standard Dictionary of the English Language (Funk & Wagnalls, 1924).

Since photographic prints, engravings, and similar "*prints*" are included in the word "picture" if they are pictorial representations, and matters printed from type are included in the words "book, pamphlet, paper, letter, writing", it follows that the word "*print*" as used in the statute, refers to other matters embraced in the accepted meaning of the word—that is, things bearing impressions which are neither "pictures, books, pamphlets, papers, letters, or writings"—impressions which can neither be seen as a picture or read as written or printed language.

B. Phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories are "prints" within the meaning of that term as used in the statute.

While the information does not use the *exact* language of the statute, it does charge the appellant in language *synonymous therewith*.

The statute reads "any obscene, lewd, lascivious, or any filthy * * * print * * *."

The information reads "phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language. * * *"

A "print" is an impression.

To "impress" is to print.

"*Impress*" is defined as

"To press, stamp or *print something in or upon*; to mark by pressure, or as by pressure; to *imprint*—

To apply with pressure or so as to press or *imprint*." (Emphasis added.)

Webster's New International Dictionary of the English Language (G. & C. Merriam Company, 1924).

Also:

"To form or fix by pressure; stamp; *imprint*—Syn. *Imprint*, inculcate, press, *print*, stamp." (Emphasis added.)

New Standard Dictionary of the English Language (Funk & Wagnalls, 1924).

The information does not charge the appellant with depositing for carriage in interstate commerce "obscene phonograph records" as such, but rather with so depositing prints of obscene, lewd, lascivious and filthy language and stories *upon* phonograph records. Such objects are within one of the classes of things specifically enumerated in the statute, and the information therefore charges an offense thereunder.

II.

EVEN IF THE OBJECTS DEPOSITED FOR CARRIAGE IN INTER-STATE COMMERCE ARE NOT WITHIN THE CLASS OF THINGS EMBRACED IN THE TERM "PRINT" AS USED IN THE STATUTE, THEY ARE NEVERTHELESS INCLUDED IN THE TERM "OTHER MATTER OF INDECENT CHARACTER".

- A. The doctrine of *ejusdem generis* requires only that the general words employed in the statute be construed to apply to things of the same general class or nature as those enumerated.

If the things referred to in the information are things of the same *general* class or nature as the things enumerated in the statute, they are included within the term "other matter of indecent character."

"Where general words follow the enumeration of particular classes of persons or acts the general words should be construed to apply to acts or persons of the same *general* nature or class as those enumerated." (Emphasis added.)

First National Bank of Anamoose v. U. S., 206 Fed. 374 (CCA-8).

B. Phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and stories belong to the same general class as the objects specifically enumerated in the statute.

An obscene and filthy story impressed upon a phonograph record is not in a class distinct from a similar story printed in a book, or impressed in a piece of wax, or written with a sharp instrument on a block of wood.

Obscene language heard on a phonograph is the same as obscene language read in a newspaper.

All of the objects enumerated in the statute are means for the recordation of obscenities. So is a phonograph record.

All the enumerated objects present the recorded obscenities to the senses. So does a phonograph record.

All the enumerated objects are capable of repeated use in dissemination of obscenities. So is a phonograph record.

All are readily portable. So is a phonograph record.

A book, pamphlet, letter, paper, writing, depend upon the language to record and disseminate obscenity. So does a phonograph record.

All the enumerated objects are capable of telling a story. So is a phonograph record.

All the enumerated objects are capable of being readily concealed from the watchfulness of parental and other authority. So is a phonograph record.

C. Appellant's argument that phonograph records are not in the same general class as the enumerated objects is erroneous.

Appellant's argument is based upon false premises. It is stated (Appellant's Opening Brief, p. 18) that obscene matter is communicated to the human mind in only two ways, through the sense of sight and through the sense of hearing. This is false, as obscenity may also be communicated through the sense of touch.

It is further assumed that all the objects enumerated in the statute communicate obscenity only by visual representation. This premise also is false.

The obscenity contained in the first item enumerated in the statute—"book"—is capable of tactile as well as visual communication. There are many books in circulation which no man may read with his eyes, but which are read by the blind through the sensitive touch of the fingers. Surely appellant would not argue that books so read are any the less "books" because he cannot read them, or that a book printed for the use of the blind would not be within the prohibition of the statute, if it were obscene.

Also, the obscenity impressed on a motion picture film can be heard as well as seen. It is ridiculous to argue that a motion picture film can only present obscenity to the eyes. Perhaps when the statute was amended in 1920 there was no sound-track upon a motion picture film. But there has been for many years, and we must take "motion picture film" to mean what it means today, not what it meant a quar-

ter of a century ago. The common meaning of the words has changed with the times, and Congress, like all of us, has seen the change. Were it the intent of Congress to restrict the application of the statute to "silent" motion picture film, Congress would have amended the statute when the words used came to have a new and different meaning, and in common usage described a new and different object. Since Congress did not see fit to do so, we must assume that Congress intended the "talking" motion picture film to be within the purview of the statute. And would appellant argue that a motion picture film depicting innocuous action, but assaulting the ears with obscenity, is not an "obscene motion picture film" within the meaning of the statute? We think not.

The argument that objects disseminating obscenity by means other than visual representation are not within the prohibition of the statute is therefore fallacious, since two of the objects specifically enumerated are capable of doing so.

Since the dawn of time the purveyors of obscenity and merchants of filth have kept step with progress in the arts and sciences, to bend them all to serve ignoble ends. From crude drawings the Dawn Man made on prehistoric cave walls before a written language was devised by some genius of old, through the days of the stone tablet, papyrus and illuminated manuscript to the time of Caxton, and unto our own day, they have left nothing untouched, no means un-

tried to perpetuate the same old obscenities, and corrupt each new generation throughout the centuries with the same old filth. A book, a pamphlet, a picture, a paper, a letter, a writing, a print, a motion picture film, a phonograph record, whatever will take the impression of a lascivious thought from a lewd and perverted mind they have used, and use today, and will use to the end of time.

CONCLUSION.

For the reasons stated we respectfully submit that the judgment of the District Court should be affirmed.

Dated, San Francisco, California,

April 8, 1949.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

DANIEL C. DEASY,

Assistant United States Attorney,

Attorneys for Appellee.

No. 12,157

IN THE

United States Court of Appeals
For the Ninth Circuit

ALEXANDER LAWRENCE ALPERS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

HONE & LOBREE,

HASKELL TITCHELL,

79 Post Street, San Francisco 4, California,

Attorneys for Appellant.

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APR 25 1949

Subject Index

| | Page |
|--|------|
| I. | |
| The burden is upon appellee to prove that the shipment in interstate commerce of obscene phonograph records comes within the meaning and intendment of Title 18 U.S.C.A. Section 396 | 1 |
| II. | |
| Phonograph records are not "prints" within the meaning and intendment of Title 18 U.S.C.A. Section 396..... | 2 |
| A. The word "print" as used in Title 18 U.S.C.A. Section 396 must be read in its plain, ordinary and usual sense and with the meaning commonly attributable to it.... | 2 |
| B. The meaning assigned to the word "print" by appellee is hidden and obscure, is based upon a false premise and violates the accepted rules of statutory construction | 3 |
| C. The history of Title 18 U.S.C.A. Section 396 shows that the construction placed upon the word "print" by appellee is not applicable | 5 |
| III. | |
| Phonograph records are not within the meaning of the words "or other matter of indecent character" as such words are used in Title 18 U.S.C.A. Section 396 | 6 |
| IV. | |
| The more comprehensive classifications established by appellant have not been controverted by appellee..... | 8 |
| Conclusion | 9 |

Table of Authorities Cited

| Cases | Pages |
|--|--------------|
| Lundstrom v. Commissioner (CCA-9th), 149 Fed. (2d) 244 | 4 |
| Sanborn v. Commissioner, 88 Fed. (2d) 134..... | 4 |
| U. S. v. Temple, 105 U. S. 97 | 3 |

Codes

| | |
|-------------------------------|---------------|
| 18 U.S.C.A. Section 396 | 1, 2, 5, 6, 9 |
|-------------------------------|---------------|

No. 12,157

IN THE

**United States Court of Appeals
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| VS. | |
| UNITED STATES OF AMERICA, | } |
| <i>Appellee.</i> | |

APPELLANT'S REPLY BRIEF.

I.

THE BURDEN IS UPON APPELLEE TO PROVE THAT THE SHIPMENT IN INTERSTATE COMMERCE OF OBSCENE PHONOGRAPH RECORDS COMES WITHIN THE MEANING AND INTENDMENT OF TITLE 18 U.S.C.A. SECTION 396.

The burden rests upon appellee to show that the acts of appellant constitute a crime against the United States. It is not enough that appellee show that the accused was guilty of reprehensible conduct. It is not enough that appellee show that such acts *ought* to be a crime. Appellee must show that the acts complained of *actually are* a crime.

We, too, have no sympathy for the "purveyors of obscenity and merchants of filth" nor for the "ignoble

end'' which they serve. However, we do have the utmost respect for the law and for the principles on which it was founded and by which it has grown and developed. We believe that it is far more important to society for this court to uphold those principles of law, even at the cost of permitting conduct it deems reprehensible to go unpunished, than it is to punish such conduct and in so doing to twist and distort these principles beyond recognition. Therefore, we have insisted that appellee prove that the acts of appellant constitute a crime under the law and under the principles upon which the law is based. This appellee has failed to do. The brief submitted by appellee is a stirring statement in support of amendment of the statute, but it does not establish that the shipment of obscene phonograph records in interstate commerce is within the intendment of the statute at the present time.

II.

PHONOGRAPH RECORDS ARE NOT "PRINTS" WITHIN THE MEANING AND INTENDMENT OF TITLE 18, U.S.C.A. SECTION 396.

- A. The word "print" as used in Title 18, U.S.C.A. Section 396 must be read in its plain, ordinary and usual sense and with the meaning commonly attributable to it.

Words in common use are to be construed in their natural, plain and ordinary signification and the meaning commonly attributable to them is to be preferred to any secondary hidden signification.

U. S. v. Temple, 105 U. S. 97:

“The Supreme Court must read a statute according to the natural and obvious import of the language without resorting to subtle and forced constructions for the purpose of either limiting or extending its operation.”

The word “print” is a common word with common connotations. Used in the form “a print”, its common connotation is a special type of picture such as a woodcut, engraving or lithograph. Specific and well known examples of this common connotation are the Currier and Ives prints. Another common connotation of the word “print” may be found in such things as magazines, periodicals or other reading matter. A specific and common example of this connotation is newsprint. The third type of common connotation associated with the word “print” is less specific and has reference to the form in which material is presented. One thinks of something “printed” as opposed to something written by hand—a picture mechanically reproduced as against a picture drawn or painted. These are the common, plain, every day meanings of the word “print”. These are the meanings of the word “print” to the average man. To locate, define and establish these meanings one does not need to search a dictionary.

B. The meaning assigned to the word “print” by appellee is hidden and obscure, is based upon a false premise and violates the accepted rules of statutory construction.

It is only by ingenious reaching that appellee has been able to arrive at the curious and hidden meaning

it desires us to accept. It is only by ignoring the common connotations of the word "print" and by the diligent and subtle searching of a dictionary that appellee is able to find some semblance of support for its interpretation. Such searching and reaching have been consistently condemned by our courts.

Lundstrom v. Commissioner, (CCA-9th) 149 Fed. (2d) 244:

"Where the statute plainly expresses the will of Congress in language that does not permit or require strained construction, words thereof may not be extended by intendment or distorted beyond their plain and proper meaning."

Sanborn v. Commissioner, 88 Fed. (2d) 134:

"The plain, obvious and natural meaning is always preferred to any curious hidden sense that nothing but the exigencies of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

To justify the necessity for such ingenious searching, appellee states as a fundamental premise (Appellee's Brief, p. 5) that it is necessary in order to determine the precise meaning of the word used, to exclude such words as would make any of the words synonymous with one another. This premise we are asked to accept *a priori*. A simple reading of the statute and the synonymic words "book", "pamphlet" and "writing" demonstrates the impossibility of accepting this premise. Yet it is by means of this premise that appellee justifies its strained construction of the word "print".

C. The history of Title 18 U.S.C.A. Section 396 shows that the construction placed upon the word "print" by appellee is not applicable.

As appellant has pointed out (Appellant's Opening Brief, pp. 9, 10 and 11), this particular statute was amended by Congress in 1920 and there were added to its the words "motion picture film". At the time of this amendment the word "print" was an integral part of the statute. As we have seen, by this amendment Congress indicated that it did not feel that motion picture films were covered by the statute prior to that time. Appellee concedes this fact. (Appellee's Brief, p. 5.) In conceding this fact, appellee states that:

"Congress presumably considering it more than a 'picture'."

Appellee might just as readily, and possibly more accurately, have stated that a motion picture film was more than a "print". We all know that a simple photograph such as a snapshot is referred to as a "print" when it is developed; we also know that when we take a roll of film to be developed we must advise the person developing the film of the number of "prints" we desire. A motion picture film is nothing more than a series of photographs which have been printed on a continuous roll. The only distinction in this respect between a motion picture film and a common photograph is that the motion picture film images are considerably smaller and that they are printed on a positive transparency instead of paper. In contrast to this, a phonograph record is not commonly referred

to as being "printed". A phonograph record is more commonly referred to as being molded. The reason for this is to be found in the process whereby a record is made. In this process the material from which a record is manufactured is placed into a form containing the matrix of a record in a liquid or semi-liquid condition. The material is then placed under pressure and is molded to form the finished product.

Since it was necessary for Congress to amend the statute in 1920 to include motion picture film which possesses the qualities of both "picture" and "print", it is impossible to see how the single word "print" can be strained to include phonograph records which possess none of these qualities. Rather, it would appear that in order to include these records within the statute a similar amendment must be made.

III.

PHONOGRAPH RECORDS ARE NOT WITHIN THE MEANING OF THE WORDS "OR OTHER MATTER OF INDECENT CHARACTER" AS SUCH WORDS ARE USED IN TITLE 18 U.S.C.A. SECTION 396.

If phonograph records are to be construed as being within the meaning of the term "or other matter of indecent character" as such words are used in Title 18 U.S.C.A. Section 396, they must, under the law of *ejusdem generis*, be of the same class as the articles specifically enumerated in the statute. It would seem readily apparent that appellee by arguing at length

the classification "print" and by not attempting in any way to argue any of the other classifications has already put its best foot forward, and that it believes that if phonograph records come within any of the enumerated classes, they must come within the word "print".

We have demonstrated that the word "print" cannot be construed to include phonograph records. What other classes are specifically enumerated in the statute? Those remaining are "book", "pamphlet", "picture", "motion picture film", "paper", "letter", "writing". A phonograph record is not a book nor is it a pamphlet; a phonograph record is not a picture nor a motion picture film; nor is a phonograph record a letter or a writing. It necessarily follows that phonograph records not being of the same class as the articles specified cannot be construed to be within the meaning of the statute.

The only basis upon which appellee can support its statement that phonograph records are within the general words "or other matter of indecent character" is if these words can be construed to include all matter of an indecent character. This is clearly indicated by the closing language of appellee's brief. However, we know that the statute is not all inclusive and was not intended to be all inclusive. We know, also, that under the doctrine of *ejusdem generis* these general words cannot be construed to make the statute all inclusive. Therefore, it appears that there is no support for appellee's contention that the general words can be construed to include phonograph records.

IV.

**THE MORE COMPREHENSIVE CLASSIFICATIONS ESTABLISHED
BY APPELLANT HAVE NOT BEEN CONTROVERTED BY AP-
PELLEE.**

While we do not believe it is essential, in the light of what has heretofore been set forth in this brief, to reaffirm the broad classifications made by appellant, we would like to point out to the court that the so-called two exceptions seized upon by appellee to disprove appellant's theory are not, in truth, exceptions at all. The Braille system was devised as a substitute for the visual sense of the blind. A book written in Braille, therefore, may be considered a type of substituted visual representation within the meaning and intendment of the statute. This is particularly so because this substitute for the visual sense is in the exact form of an article specifically prohibited by the statute.

Motion picture film at the time the amendment to the statute was made in 1920 was solely a visual representation. Today, in many instances, the sound track does accompany the visual representation but it should be noted that it is only ancillary thereto and not a substitute therefor. The visual representation still remains the prime characteristic of motion picture film. It is more complex today than it was in 1920, but this fundamental characteristic of visual representation has not been removed.

CONCLUSION.

In conclusion, it is respectfully submitted that appellee has failed to establish that obscene phonograph records are within the meaning and the purview of Title 18 U.S.C.A. Section 396. It is further submitted that under the rules of law applicable to statutory construction, the language of this particular statute does not permit the inclusion therein of phonograph records. If the shipment in interstate commerce of such records is to be prohibited, it should be done by amendment to the statute and not by the strained construction of a court.

Dated, San Francisco, California,
April 25, 1949.

Respectfully submitted,
HONE & LOBREE,
HASKELL TITCHELL,
Attorneys for Appellant.

No. 12158

United States
Court of Appeals
for the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation;
MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O.
TOBELER, Executor of the Last Will and Testament of John K.
Suckow, Deceased, and RUTH E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD, PACIFIC COAST BORAX COM-
PANY, UNITED STATES BORAX COMPANY, AMERICAN
POTASH & CHEMICAL CORPORATION, STAUFFER CHEMI-
CAL COMPANY, WEST END CHEMICAL COMPANY, WEST-
ERN BORAX COMPANY, LTD., GOLDFIELDS AMERICAN
DEVELOPMENT COMPANY, PACIFIC ALKALI COMPANY,
F. LESSER, JAMES M. GERSTLEY, FRANK M. JENIFER, P.
C. BAKER, ALLEN W. ASHBURN, WALTER A. MOSES,
BANK OF AMERICA NATIONAL TRUST AND SAVINGS AS-
SOCIATION as Executor of the Last Will and Testament of
Clarence McAnisse Rasor, deceased, BEN H. BROWN, as Special
Administrator of the Estate of Victor C. Emden, deceased, et al.,
Appellees.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 361 to 676, inclusive)

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED

APR 15 1949



No. 12158

United States
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for the Ninth Circuit

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ERN BORAX COMPANY, LTD., GOLDFIELDS AMERICAN
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Appellees.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 361 to 676, inclusive)

Appeal from the United States District Court
for the Northern District of California,
Southern Division

Exhibit No. 11—(Continued)

State of California,
County of Los Angeles—ss.

On this day of August, 1934, before me,
....., a Notary Public in and
for the said County of Los Angeles, State of Cali-
fornia, residing therein, duly commissioned and
sworn, personally appeared John K. Suckow, known
to me to be the President, and Frank Buren, known
to me to be the Secretary of Suckow Borax Mines
Consolidated, Inc., the corporation which executed
the within and annexed instrument, known to me to
be the persons who executed the within instrument on
behalf of the corporation therein named, and ac-
knowledged to me that such corporation executed the
same.

In Witness Whereof, I have hereunto set my hand
and affixed my official seal in said county the day
and year in this certificate first above written.

.....,
Notary Public in and for said County and State.

State of California,
County of Los Angeles—ss.

On this day of August, 1934, before me, Effie
D. Botts, a Notary Public in and for the said County
and State, residing therein, duly commissioned and
sworn, personally appeared F. M. Jenifer, known
to me to be the Vice-President of Pacific Coast
Borax Company, the corporation that executed the
within instrument, known to me to be the person

Exhibit No. 11—(Continued)

who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

.....,
Notary Public in and for said County and State.

State of New York,
County of New York—ss.

On this day of August, 1934, before me,, a Notary Public in and for the said County of New York, State of New York, residing therein, duly commissioned and sworn, personally appeared F. T. Winters, known to me to be the Secretary of Pacific Coast Borax Company, the corporation which executed the within and annexed instrument, known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

.....,
Notary Public in and for said County and State.

* * * *

Exhibit No. 11—(Continued)

EXHIBIT “H”

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 7506

[Title of Cause.]

STIPULATION FOR DISMISSAL
OF APPEAL

It Is Hereby Stipulated and Agreed by and between the parties to this cause, by their respective attorneys, that the appeal herein be dismissed without costs to either party; that each party pay his or its own costs in this court and in the court below; that the cost bond on appeal furnished by appellant be cancelled and the liability of the obligor thereon discharged.

It Is Further Stipulated that the Clerk of the said Circuit Court of Appeals is hereby requested and directed to forthwith and without notice enter an order dismissing the said appeal in accordance herewith.

Dated August, 1934.

HIRAM E. CASEY,
FRANK BUREN,
WILLIAM H. NEBLETT,
ARNOLD A. ODLUM,

By,
Solicitors for Defendant and Appellant.

NEWLIN & ASHBURN,
By,
Solicitors for Plaintiff and Appellee.

Exhibit No. 11—(Continued)

EXHIBIT "I"

In the Superior Court of the State of California
In and For the County of Kern

No. 22868

JOHN K. SUCKOW,

Plaintiff,

vs.

UNITED STATES BORAX COMPANY, a corporation,
PACIFIC COAST BORAX COMPANY, a corporation, and BORAX CONSOLIDATED, LTD., a corporation,

Defendants.

and

BORAX CONSOLIDATED, LTD., a corporation,

Cross-Complainant,

vs.

JOHN K. SUCKOW, MOJAVE BORAX COMPANY, LTD., a corporation, ONE DOE, TWO DOE and ONE DOE COMPANY, a corporation,

Cross-Defendants.

STIPULATION FOR JUDGMENT

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled and numbered action that judgment may be forthwith and without notice made and entered in the above entitled cause, which said judgment, properly entitled, shall be in the following form, to wit:

Exhibit No. 11—(Continued)

“[Title of Court and Cause.]

JUDGMENT

It appearing to the court that all of the parties to the above entitled action (except certain cross-defendants sued under fictitious names) have duly executed and acknowledged and caused to be filed herein a certain stipulation for judgment, which is also duly signed by the attorneys for the respective parties, wherein and whereby it is stipulated and agreed that judgment be forthwith and without notice entered herein in the form and upon the terms and conditions herein set forth;

Now, Therefore, in consideration of the premises and in accordance with the said stipulation, and upon motion of Messrs. Newlin & Ashburn, attorneys for the defendants and cross-complaint in the said action, the cross-complaint herein is dismissed as to the said fictitious defendants One Doe, Two Doe and One Doe Company, a corporation; and

It Is Hereby Ordered, Adjudged and Decreed that plaintiff John K. Suckow do have or recover nothing of or from the defendants United States Borax Company, Pacific Coast Borax Company and Borax Consolidated, Ltd., or any of them, and that the complaint of the said plaintiff herein be and it hereby is dismissed; and

It Is Further Ordered, Adjudged and Decreed that the defendant and cross-complainant Borax Consolidated, Ltd., a corporation, was, at the time of the commencement of this action, and now is the owner in fee simple absolute and in possession of

Exhibit No. 11—(Continued)

that certain lot, piece or parcel of land situated, lying and being in the County of Kern, State of California, and particularly described as follows, to wit: The East Half of the Southeast Quarter ($E \frac{1}{2}$ of the $SE \frac{1}{4}$) of Section 14, Township 11 North, Range 8 West, S.B.B.&M.; and the right, title and interest of the said defendant and cross-complainant Borax Consolidated, Ltd., a corporation, in and to the said premises, as such owner in fee simple, is hereby declared and established; and

It Is Further Ordered, Adjudged and Decreed that plaintiff John K. Suckow and cross-defendant Mojave Borax Company, Ltd., a corporation, have not and that neither of them has nor had they or either of them at the time of the commencement of this action any right, title, interest, lien or estate whatsoever in or to the land or premises above mentioned and described or in or to any part or parcel thereof; and

It Is Further Ordered, Adjudged and Decreed that the said plaintiff John K. Suckow and the said cross-defendant Mojave Borax Company, Ltd., a corporation, and all persons claiming under them or either of them subsequent to the filing of notice of pendency of said cross-complaint, to wit, December 29, 1932, be and they are hereby forever enjoined and debarred from asserting any claim of right or title whatever in, to or with respect to the said real property, or any part or parcel thereof, adverse to the said defendant and cross-complainant Borax Consolidated, Ltd., or any lien thereon, and from

Exhibit No. 11—(Continued)

in any manner interfering with said property or entering upon or exercising acts of ownership over the same or interfering with the use, occupancy and control of the said premises by the said defendant and cross-complainant Borax Consolidated, Ltd.; and

It Is Further Ordered, Adjudged and Decreed that no party shall recover any costs from any other party hereto.

Done In Open Court this day of July, 1934.

.....,
Judge.”

and

It Is Further Hereby Stipulated that each party hereto does hereby waive any right or claim of right of appeal from any judgment entered upon and in accordance with this stipulation.

Dated August, 1934.

BRITTAN & MACK,
FRANK BUREN,
WILLIAM H. NEBLETT,
ARNOLD A. ODLUM,

By

Attorneys for Plaintiff John K. Suckow and Cross-defendant Mojave Borax Company, Ltd.

.....,
JOHN K. SUCKOW
MOJAVE BORAX CO., LTD.,
a corporation,

Exhibit No. 11—(Continued)

By
President.

Attest:

.....
Secretary.

GLEN ANDRICH,
NEWLIN & ASHBURN,

By

Attorneys for Defendants United States Borax
Company, a corporation, Pacific Coast Borax
Company, a corporation, and for Defendant and
Cross-Complainant Borax Consolidated, Ltd., a
corporation,

UNITED STATES BORAX CO.,
a corporation,

By
Vice-President.

Attest:

.....
Secretary.

PACIFIC COAST BORAX CO.,
a corporation,

By
Vice-President.

Attest:

Secretary.

BORAX CONSOLIDATED,
LTD., a corporation,

By
Its Attorney-in-Fact.

Exhibit No. 11—(Continued)

State of California,
County of Los Angeles—ss.

On this day of August, 1934, before me,
....., a Notary Public in and
for said County and State, residing therein, duly
commissioned and sworn, personally appeared John
K. Suckow, personally known to me to be the person
whose name is subscribed to the within instrument,
and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand
and affixed my official seal in said county the day
and year in this certificate first above written.

.....,

Notary Public in and for said County and State.

State of California,
County of Los Angeles—ss.

On this day of August, 1934, before me,
....., a Notary Public in and
for said County and State, residing therein, duly
commissioned and sworn, personally appeared John
K. Suckow, known to me to be the President, and
Frank Buren, known to me to be the Secretary of
Mojave Borax Company, Ltd., the corporation which
executed the within and annexed instrument, known
to me to be the persons who executed the within
instrument on behalf of the corporation therein
named, and acknowledged to me that such corpora-
tion executed the same.

In Witness Whereof, I have hereunto set my hand

Exhibit No. 11—(Continued)

and affixed my official seal in said county the day
and year in this certificate first above written.

.....,
Notary Public in and for said County and State.

State of California,
County of Los Angeles—ss.

On this day of August, 1934, before me,
....., a Notary Public in and
for said County and State, residing therein, duly
commissioned and sworn, personally appeared C. R.
Dudley, known to me to be the Vice-President, and
J. R. Holtum, known to me to be the Secretary of
United States Borax Company, the corporation
which executed the within and annexed instrument,
known to me to be the persons who executed the
within instrument on behalf of the corporation
therein named, and acknowledged to me that such
corporation executed the same.

In Witness Whereof, I have hereunto set my hand
and affixed my official seal in said county the day
and year in this certificate first above written.

.....,
Notary Public in and for said County and State.

State of California,
County of Los Angeles—ss.

On this day of August, 1934, before me, Effie
D. Botts, a Notary Public in and for the said County
and State, residing therein, duly commissioned and
sworn, personally appeared F. M. Jenifer, known to
me to be the Vice-President of Pacific Coast Borax

Exhibit No. 11—(Continued)

Company, the corporation that executed the within instrument, known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

.....,
Notary Public in and for said County and State.

State of New York,
County of New York—ss.

On this day of August, 1934, before me, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared F. T. Winters, known to me to be the Secretary of Pacific Coast Borax Company, the corporation which executed the within and annexed instrument, known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

.....,
Notary Public in and for said County and State.

Exhibit No. 11—(Continued)

State of California,
County of Los Angeles—ss.

On this day of August, 1934, before me, Effie D. Botts, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared F. M. Jenifer, personally known to me to be the person described in and whose name is subscribed to the within instrument, as the attorney in fact of Borax Consolidated, Ltd., and acknowledged to me that he subscribed the name of Borax Consolidated, Ltd., thereto as principal and his own name as attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

.....,
Notary Public in and for said County and State.

Exhibit No. 11—(Continued)

EXHIBIT “J”

In the United States Circuit Court of Appeals
For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation,

Defendant and Appellant,
vs.

PACIFIC COAST BORAX COMPANY, a corporation,

Plaintiff and Appellee.

STIPULATION FOR DISMISSAL
OF APPEAL

Whereas, an interlocutory decree was on or about November 14, 1933, made and entered in the United States District Court for the Southern District of California, Northern Division, in that certain patent infringement equity action numbered D-18-M on the records of the said court and entitled “Pacific Coast Borax Company, a corporation, plaintiff, vs. Suckow Borax Mines Consolidated, Inc., a corporation, defendant”, and the said defendant has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the said interlocutory decree, but the record on appeal has not been filed in the said appellate court and the cause has not been docketed therein, all of which is more particularly shown by the Certificate of the Clerk of the said District Court made pursuant to Rule 16 of the said Circuit Court of Appeals, and the parties

Exhibit No. 11—(Continued)

to the said cause have adjusted their differences and agreed upon a dismissal of the said appeal,

Now, Therefore, It Is Hereby Stipulated and Agreed by and between the parties to this cause, by their respective attorneys, that the appeal herein be dismissed without costs to either party; that each party pay its own costs in this court and in the court below; that the cost bond on appeal furnished by appellant be cancelled and the liability of the obligor thereon discharged.

It Is Further Stipulated that the Clerk of the said Circuit Court of Appeals is hereby requested and directed to forthwith and without notice enter an order dismissing the said appeal in accordance herewith.

Dated July, 1934.

JOSEPH F. WESTALL,
Solicitor for Defendant and Appellant.

FRANK L. A. GRAHAM,
Solicitor for Plaintiff and Appellee.

Exhibit No. 11—(Continued)

EXHIBIT "K"

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 7299

In the Matter of SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation,

Bankrupt.

BORAX CONSOLIDATED, LTD., a corporation,
Appellant,

vs.

PACIFIC IRON AND STEEL COMPANY, INC.,
a corporation, H. C. FOLTS, doing business as
Folts Electric Service, and L. E. ELLINGTON,
Petitioning Creditors; L. H. WILSON, SAMUEL B. SALBERSEN, and ROBERT M. NICE,
Intervening Creditors; and HUBERT F. LAUGHARN, as Trustee in Bankruptcy of Suckow
Borax Mines Consolidated, Inc., a corporation,
Appellees.

STIPULATION FOR DISMISSAL OF APPEAL

It Is Hereby Stipulated and Agreed by and between the parties to this cause, by their respective attorneys, that the appeal herein be dismissed without costs to either party; that each party pay his or its own costs in this court and in the court below.

It Is Further Stipulated that the Clerk of the said Circuit Court of Appeals is hereby requested

Exhibit No. 11—(Continued)

and directed to forthwith and without notice enter an order dismissing the said appeal in accordance herewith.

Dated August, 1934.

NEWLIN & ASHBURN,
Attorneys for Respondent and Appellant Borax Consolidated, Ltd., a corporation.

WALTER H. MOSES,
Attorney for Petitioning and Intervening Creditors and Trustee in Bankruptcy, Appellees.

EXHIBIT "L"

In the District Court of the United States,
Southern District of California,
Central Division

No. 16938-H

In the Matter of SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation,
Alleged Bankrupt.

STIPULATION FOR DISMISSAL OF
PROCEEDING FOR REVIEW

Whereas, a certain "Petition for Review of Referee's Order Directing, Instructing and Authorizing Trustee to Execute and Deliver Lease of Mining Property of the Bankrupt Estate" was on or about April 27, 1934, filed with the Referee in Bankruptcy in that certain bankruptcy proceeding pending in the United States District Court for the Southern Dis-

Exhibit No. 11—(Continued)

trict of California, Central Division, numbered 16,-938-H on the records of the said court and entitled "In the Matter of Suckow Borax Mines Consolidated, Inc., a corporation, Alleged Bankrupt", which said petition seeks to review a certain order made by Honorable Earl E. Moss, as Referee in Bankruptcy, in said cause on or about April 17, 1934, authorizing and directing Hubert F. Laugharn, as trustee in bankruptcy of the estate of the said alleged bankrupt, to enter into a certain lease, as Lessor, with Pacific Coast Borax Company, a corporation, as Lessee, covering certain real and personal property of the bankrupt corporation; and

Whereas, the said proceeding for a review of the said order is now pending in the said United States District Court for the Southern District of California, Central Division, and the parties in interest have agreed upon a dismissal of the said proceeding, Now, Therefore,

It Is Hereby Stipulated that the said Petition for Review and all proceedings thereon shall be and they hereby are dismissed without costs to any party and the above named court is hereby requested to forthwith and without notice make its order dismissing said proceeding in accordance herewith.

Dated August . . . , 1934.

HIRAM E. CASEY,
FRANK BUREN,
WILLIAM H. NEBLETT,
ARNOLD A. ODLUM,

Attorneys for Petitioner on Review, Suckow Borax
Mines Consolidated, Inc., a corporation.

Exhibit No. 11—(Continued)

NEWLIN & ASHBURN,
Attorneys for Respondents Borax Consolidated,
Ltd., a corporation, and Pacific Coast Borax
Company, a corporation.

WALTER H. MOSES,
Attorney for Hubert F. Laugharn, as said Trustee
in Bankruptcy.

In accordance with the foregoing stipulation,

It Is Hereby Ordered that the above mentioned
proceeding for review be and it hereby is dismissed
without costs.

August

Dated July, 1934.

.....,
District Judge.

EXHIBIT "M"

In the District Court of the United States, Southern
District of California, Central Division

No. 16938-H

In the Matter of SUCKOW BORAX MINES CON-
SOLIDATED, INC., a corporation,
Alleged Bankrupt.

STIPULATION FOR DISMISSAL OF
PROCEEDING FOR REVIEW

Whereas, a certain "Petition for Review of Ref-
eree's Order Directing Redelivery of Drill Rig and
Engine to Estate of Alleged Bankrupt herein" was
on or about June 2, 1934, filed with the Referee in
Bankruptcy in that certain bankruptcy proceeding

Exhibit No. 11—(Continued)

pending in the United States District Court for the Southern District of California, Central Division, numbered 16938-H on the records of the said court and entitled “In the Matter of Suckow Borax Mines Consolidated, Inc., a corporation, Alleged Bankrupt”, which said petition seeks to review a certain order made by Honorable Earl E. Moss, as Referee in Bankruptcy, in said cause on or about May 25, 1934, pertaining to the title, ownership and possession of a certain “Armstrong well rig, Model No. 45-W Serial 27148 and one Le Roi Engine, Model 2 TC Serial 09269”; and

Whereas, the said proceeding for a review of the said order is now pending in the said United States District Court for the Southern District of California, Central Division, and the parties in interest have agreed upon a dismissal of the said proceeding, Now, Therefore,

It Is Hereby Stipulated that the said Petition for Review and all proceedings thereon shall be and they hereby are dismissed without costs to any party and the above named court is hereby requested to forthwith and without notice make its order dismissing said proceeding in accordance herewith.

Dated August, 1934.

HIRAM E. CASEY,
FRANK BUREN,
WILLIAM H. NEBLETT,
ARNOLD A. ODLUM,

Attorneys for Petitioner on Review, John K. Suckow.

Exhibit No. 11—(Continued)

WALTER H. MOSES,

Attorney for Hubert F. Laugharn, as said Trustee
in Bankruptcy.

In accordance with the foregoing stipulation,

It Is Hereby Ordered that the above mentioned
proceeding for review be and it hereby is dismissed
without costs.

Dated August, 1934.

.....,

District Judge.

EXHIBIT "N"

RELEASE

Whereas, the undersigned, Stephen Hurley, Earl Wood and Tom A. Wood have or claim to have some claim or cause of action against John K. Suckow, Ruth Young Suckow, Suckow Borax Mines Consolidated, Inc., Suckow Borax Company, Ltd., and Mojave Borax Company, Ltd., upon or on account of a certain writing dated July 14, 1933, which is in words and figures as follows, to wit:

"Mr. Stephen Hurley

"Dear Sir:

"This will confirm verbal understanding of this date that the undersigned will protect you, so far as your commissions are concerned, in any deal which the undersigned may make with Messrs. Tom A. Wood, Earl Wood and associates, affecting the controlling stock of the Suckow Borax Mines Consolidated, Inc., and forty acres of land in section 14, T.

Exhibit No. 11—(Continued)

11 N., R. 8 W., S.B.M., being the E $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$ of said section.

“It is understood that in the event you bring a proposition from the said parties which is acceptable to the undersigned, and an agreement is formally entered into between said parties and the undersigned, you shall receive 50% of all monies received by the undersigned in connection therewith, and also —50% of all stock in any new corporation which may be formed for the purpose of carrying out the purposes of the transaction.

“This is not an option nor is it to be construed as in any wise interfering with or preventing the consummation of any other deal with other parties which the undersigned may desire to enter into in the meantime.

Very truly yours,

JOHN K. SUCKOW,
RUTH YOUNG SUCKOW.”

and

Whereas, the said undersigned persons have heretofore asserted against Pacific Coast Borax Company, Borax Consolidated, Ltd., and United States Borax Company, or one or more of them, certain claims on account of the said written instrument or things alleged to have been done under or pursuant thereto,

Now, Therefore, in consideration of the sum of \$. to the said Stephen Hurley, Earl Wood and Tom A. Wood in hand paid, receipt of which contemporaneously with the signing of this instru-

Exhibit No. 11—(Continued)

ment is hereby acknowledged, the undersigned Stephen Hurley and Hurley, his wife, Tom A. Wood and Wood, his wife, and Earl Wood, an unmarried man, do each for himself or herself and his or her heirs, executors, administrators and assigns, release and forever discharge said Suckow Borax Mines Consolidated, Inc., a corporation, John K. Suckow, Ruth Young Suckow, Pacific Coast Borax Company, a Nevada corporation, Borax Consolidated, Ltd., an English corporation, and United States Borax Company, a West Virginia corporation, and each of them, their heirs, executors, administrators, successors and assigns, of and from all actions and causes of action, claims and demands whatsoever, whether or not well founded in fact or in law, for or on account of the making or alleged breach of the said instrument of July 14, 1933, or for or on account of any matter growing out of the said instrument and anything done or omitted in connection therewith, and particularly of and from any such action, cause of action, claim or demand growing out of or pertaining to the negotiation or the purchase by said Pacific Coast Borax Company, Borax Consolidated, Ltd. and United States Borax Company, or any of them, of all or any of the property of Suckow Borax Mines Consolidated, Inc., Suckow Borax Company, Ltd., Mojave Borax Company, Ltd., John K. Suckow and Ruth Young Suckow (also known as Ruth E. Suckow, Ruth Y. Suckow, Ruth Young and Ruth E. Young), or any of them and the undersigned do also release

Exhibit No. 11—(Continued)

and discharge each and all of the above mentioned persons and corporations of and from any and all and all manner of actions and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, controversies, agreements, promises, trespasses, damages, judgments, executions, claims and demands whatsoever in law or in equity which the undersigned or any of them ever had or now have or has or which they or the heirs, executors or administrators or assigns of any of them hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever, whether herein specifically mentioned or otherwise, from the beginning of the world to the date of these presents; and full satisfaction of all of said claims, demands, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, controversies, agreements, promises, trespasses, damages, judgments and executions, is hereby acknowledged.

The undersigned and each of them specifically waive any right or claimed right to hereafter assert that any cause of action or alleged cause of action or claim or demand of any nature or kind whatsoever has been, through oversight or error or intentionally or unintentionally, omitted from this release; it being the purpose and intention of this instrument to completely release and discharge said and each of the above named persons and corporations of and from any and all liability of any nature or kind whatsoever now or hereafter existing or alleged or claimed

Exhibit No. 11—(Continued)

to exist for or on account of any matter, thing or occurrence whatsoever.

Each of the undersigned further states and agrees that he or she has read this instrument in full and fully understands the same, and has executed it freely and in consideration of the above mentioned sum of \$.

In Witness Whereof, the undersigned have hereunto set their respective hands this day of August, 1934.

.
.
.
.

State of California,
County of Los Angeles—ss.

On this day of August, 1934, before me,, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Stephen Hurley and Hurley, Tom A. Wood and Wood, and Earl Wood, an unmarried man, personally known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

.,
Notary Public in and for said County and State.

Exhibit No. 11—(Continued)

EXHIBIT "O"

Los Angeles, California,
August, 1934.

To Pacific Coast Borax Company, a Nevada corporation, Borax Consolidated, Ltd., an English corporation, and United States Borax Company, a West Virginia corporation.

Gentlemen:

Referring to that certain instrument dated July 14, 1933, signed by John K. Suckow and Ruth Young Suckow, and addressed to Mr. Stephen Hurley, which is in words and figures as follows:

"This will confirm verbal understanding of this date that the undersigned will protect you, so far as your commissions are concerned, in any deal which the undersigned may make with Messrs. Tom A. Wood, Earl Wood and associates, affecting the controlling stock of the Suckow Borax Mines Consolidated, Inc., and forty acres of land in section 14, T. 11 N., R. 8 W., S.B.M., being the E $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$ of said section.

"It is understood that in the event you bring a proposition from the said parties which is acceptable to the undersigned, and an agreement is formally entered into between said parties and the undersigned, you shall receive 50% of all monies received by the undersigned in connection therewith, and also—50% of all stock in any new corporation which may

Exhibit No. 11—(Continued)

be formed for the purpose of carrying out the purposes of the transaction.

“This is not an option nor is it to be construed as in any wise interfering with or preventing the consummation of any other deal with other parties which the undersigned may desire to enter into in the meantime.”

We are informed that you are about to purchase and/or lease from the said John K. Suckow and Ruth Young Suckow and/or Suckow Borax Mines Consolidated, Inc., Suckow Borax Company, Ltd. and Mojave Borax Company, Ltd. or some of them certain real properties belonging to or alleged to belong to them or some of them; this instrument is executed by each of the undersigned with the understanding that you will rely upon it in making said purchase and/or lease and as a representation upon which it is conceded you are entitled to rely in the making of said purchase and/or lease. To that end, it is hereby stated and represented to you, and each of you, that the undersigned do not nor does any of them make or assert any claim against you or any of you on account of the purchase or lease or negotiation of purchase or lease of all or any of the above mentioned properties or on account of the above quoted instrument of July 14, 1933, or anything done or alleged to have been done or omitted or alleged to have been omitted by you or any of you thereunder or with respect thereto. It is the purpose and intention of this instrument to relinquish, so far as you and each of you are concerned, any claims heretofore asserted by the undersigned or any of

Exhibit No. 11—(Continued)

them against you or any of you with respect to the above quoted instrument or anything done or to be done by you or any of you with respect thereto or with respect to the properties therein mentioned or any other properties of John K. Suckow, Ruth Young Suckow, Suckow Borax Mines Consolidated, Inc., Suckow Borax Company, Ltd. and Mojave Borax Company, or any of them, and to assure you that, so far as the undersigned and each of them are concerned, they have and assert no rights which can lawfully interfere with your negotiating or consummating any of the above mentioned purchases or lease.

Any and all rights with respect to the said instrument of July 14, 1933, and anything done or omitted thereunder are expressly reserved as to the said John K. Suckow and Ruth Young Suckow.

In Witness Whereof, we have hereunto set our respective hands this day of August, 1934.

STEPHEN HURLEY,
TOM A. WOOD,
EARL WOOD.

State of California,
County of Los Angeles—ss.

On this day of August, 1934, before me,, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Stephen Hurley, Hurley, Tom A. Wood, Wood, and Earl

Exhibit No. 11—(Continued)

Wood, personally known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

.....,
Notary Public in and for said County and State.

EXHIBIT "P"

PROMISSORY NOTE

\$.....

Los Angeles, California, August, 1934.

..... after date and for value received, the undersigned promises to pay to John K. Suckow, or order, at its office in the Associated Realty Building, City of Los Angeles, California, the sum of Dollars without interest.

The undersigned further promises to pay all costs of collection including attorney's fees, which may be incurred in the collection of this note, or any portion thereof, and in case suit is instituted for such purpose, the amount of such attorneys' fees shall be such amount as the court shall adjudge reasonable.

PACIFIC COAST BORAX CO.,
a corporation,

By
Vice-President.

Attest:

.....
Secretary.

Exhibit No. 11—(Continued)

EXHIBIT "Q"

RELEASE

Whereas, the undersigned, Borax Consolidated, Ltd., an English corporation, is the owner of an undivided one-half interest in and to the Southwest Quarter (SW $\frac{1}{4}$) and the West Half of the Southeast Quarter (W $\frac{1}{2}$ of the SE $\frac{1}{4}$) of Section 14, Township 11 North, Range 8 West, S.B.B.&M., and the other undivided one-half thereof was originally owned by John K. Suckow, and Suckow Borax Mines Consolidated, Inc. succeeded to the right, title and interest of the said John K. Suckow in and to his said half of the said premises, and the said John K. Suckow and Suckow Borax Mines Consolidated, Inc. have been in possession of the said premises and have from time to time mined, removed and sold valuable boron ore extracted therefrom and have not paid to the undersigned any compensation whatever for or on account of its half interest in the said ore so removed and sold, and the undersigned has heretofore commenced an action in the United States District Court for the Southern District of California which is entitled "Borax Consolidated, Ltd., a corporation, Plaintiff, vs. Suckow Borax Mines Consolidated, Inc., a corporation, John K. Suckow, Defendants" and is numbered C-107-H on the records of the said court and is now pending in the Central Division of the said court as to the defendant Suckow Borax Mines Consolidated, Inc. and has heretofore proceeded to judgment as to the defendant John K. Suckow; and

Exhibit No. 11—(Continued)

Whereas, the undersigned and said defendants in the said action have heretofore compromised all of their differences,

Now, Therefore, pursuant to and in furtherance of the said compromise, the undersigned, Borax Consolidated, Ltd., a corporation, does hereby for itself, its successors and assigns, release and forever discharge the said John K. Suckow, Suckow Borax Mines Consolidated, Inc., the estate in bankruptcy of the said Suckow Borax Mines Consolidated, Inc., and the trustee in bankruptcy of the said estate, and their and each of their heirs, executors, administrators, successors and assigns, of and from any and all actions and causes of action, claims and demands whatsoever, whether or not well founded in fact or in law, now or heretofore existing or claimed to exist, for or on account of the mining, removal and/or sale of any ore from the above described premises and for or on account of any and all wrongs or alleged wrongs set forth in the Bill in Equity in the said cause No. C-107-H; and full satisfaction of all of said claims, demands and causes of action is hereby acknowledged.

In Witness Whereof, the said Borax Consolidated, Ltd. has caused this instrument to be executed by its duly authorized attorney-in-fact, this day of August, 1934.

BORAX CONSOLIDATED,
LTD., a corporation,

By,
Its Attorney-in-fact.

Exhibit No. 11—(Continued)

State of California,
County of Los Angeles—ss.

On this day of August, 1934, before me, Effie D. Botts, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared J. M. Jenifer, personally known to me to be the person described in and whose name is subscribed to the within instrument, as the attorney-in-fact of Borax Consolidated, Ltd., and acknowledged to me that he subscribed the name of Borax Consolidated, Ltd. thereto as principal and his own name as attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

(Seal) EFFIE D. BOTTS,

Notary Public in and for said County and State.

Exhibit No. 11—(Continued)

EXHIBIT "R"

In the District Court of the United States in and for
the Southern District of California, Central
Division

In Equity No. C-107-H

BORAX CONSOLIDATED, LTD., a corporation,
Plaintiff,

vs.

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation, JOHN K. SUCKOW,
Defendants.

STIPULATION FOR DISMISSAL

It Is Hereby Stipulated and Agreed that the above
entitled action be forthwith dismissed as to defend-
ant Suckow Borax Mines Consolidated, Inc., a cor-
poration, without costs to either party as against
the other, and that an order to that effect may be
forthwith entered by either party without notice.

Dated August, 1934.

NEWLIN & ASHBURN,

By,

Solicitors for Plaintiff.

HIRAM E. CASEY,

FRANK BUREN,

WILLIAM H. NEBLETT,

ARNOLD A. ODLUM,

By,

Solicitors for defendant Suckow Borax Mines Con-
solidated, Inc., a corporation.

Exhibit No. 11—(Continued)

In accordance with the foregoing stipulation, the above entitled action is hereby dismissed, without costs to either party, as to the defendant Suckow Borax Mines Consolidated, Inc.

Dated August, 1934.

.,
District Judge.

EXHIBIT "S"

In the District Court of the United States in and for the Southern District of California, Central Division

In Equity No. C-107-H

BORAX CONSOLIDATED, LTD., a corporation,
Plaintiff,

vs.

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation, JOHN K. SUCKOW,
Defendants.

SATISFACTION OF JUDGMENT

The judgment or decree herein against the defendant John K. Suckow having been compromised, full satisfaction is hereby acknowledged of the said judgment which was entered on February 9, 1934, in Judgment Book 12, at page 18, in favor of Borax Consolidated, Ltd., a corporation, plaintiff, and against said John K. Suckow, defendant, and the

Exhibit No. 11—(Continued)

Clerk is hereby authorized and directed to enter full satisfaction of record in said action.

Dated August, 1934.

NEWLIN & ASHBURN,

By,
Attorneys for Plaintiff.

BORAX CONSOLIDATED,
LTD., a corporation,

By,
Its Attorney-in-Fact.

State of California,
County of Los Angeles—ss.

On this day of August, 1934, before me Effie D. Botts, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared F. M. Jenifer, personally known to me to be the person described in and whose name is subscribed to the within instrument, as the attorney-in-fact of Borax Consolidated, Ltd., and acknowledged to me that he subscribed the name of Borax Consolidated, Ltd. thereto as principal and his own name as attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

(Seal)

EFFIE D. BOTTS,

Notary Public in and for said County and State.

Exhibit No. 11—(Continued)

EXHIBIT "T"

In the District Court of the United States in and
for the Southern District of California, Central
Division

In Equity No. 310-J

BORAX CONSOLIDATED, LTD., a corporation,

Plaintiff,

vs.

RUTH E. SUCKOW (also known as Ruth Young, Ruth E. Young
and Ruth Y. Suckow), JOHN K. SUCKOW, JOSEPH JENSEN,
LOIS W. JENSEN, WILLIAM H. NEBLETT, JANE DOE NEB-
LETT, FRANK BUREN, JANE DOE BUREN, THOMAS W.
McMANUS, JANE DOE McMANUS, WILLIAM McCLINTOCK,
ELLEN McCLINTOCK, PAUL FRIEDMAN, JANE DOE
FRIEDMAN, H. D. STEVENS, JANE DOE STEVENS, C. W.
HILL, JANE DOE HILL, H. H. MORETON, JANE DOE MORE-
TON, STEPHEN HURLEY, JANE DOE HURLEY, EARL
WOOD, JANE DOE WOOD, TOM A. WOOD, MARY ROE
WOOD, SUCKOW BORAX COMPANY, LTD., a corporation,
MOJAVE BORAX COMPANY, LTD., a corporation, SUCKOW
BORAX MINES CONSOLIDATED, INC., a corporation, SE-
CURITY-FIRST NATIONAL BANK OF LOS ANGELES, a na-
tional banking association, TITLE INSURANCE AND TRUST
COMPANY, a corporation, JOHN DOE ONE, JOHN DOE TWO,
JOHN DOE THREE, JOHN DOE FOUR, JOHN DOE FIVE,
MARY DOE ONE, MARY DOE TWO, MARY DOE THREE,
MARY DOE FOUR, MARY DOE FIVE, JOHN DOE COR-
PORATION ONE, a corporation, JOHN DOE CORPORATION
TWO, a corporation, JOHN DOE CORPORATION THREE, a
corporation, JOHN DOE CORPORATION FOUR, a corpora-
tion, and JOHN DOE CORPORATION FIVE, a corporation,

Defendants.

STIPULATION FOR DISMISSAL

It Is Hereby Stipulated and Agreed between the
undersigned parties to the above entitled action (be-

Exhibit No. 11—(Continued)

ing the only parties who have appeared therein) that all issues of the said complaint and of the answers of the respective parties pertaining to the East Half of the Southeast Quarter ($E\frac{1}{2}$ of the $SE\frac{1}{4}$) of Section 14, Township 11 North, Range 8 West, S.B. B.&M., in the County of Kern, State of California, and particularly the issues raised with respect to subdivision (g) of paragraph VII of the bill of complaint in the above-entitled action, be, and they hereby are, withdrawn and eliminated from said action; and

It Is Further Stipulated and Agreed that the above entitled action may be forthwith dismissed as to all defendants without costs to any party as against any other party, and that an order to that effect may be forthwith entered by any party without notice.

Dated August, 1934.

NEWLIN & ASHBURN,

By,
Solicitors for Plaintiff.

WILLIAM H. NEBLETT,
FRANK BUREN,
EDWARD H. MITCHELL,
ARNOLD A. ODLUM,

By,
Solicitors for Defendants Ruth E. Suckow, John K. Suckow, Suckow Borax Company, Ltd., Mojave Borax Company, Ltd., and Suckow Borax Mines Consolidated, Inc.

Exhibit No. 11—(Continued)

WILLIAM H. NEBLETT,
ARNOLD A. ODLUM,
EDWARD H. MITCHELL,

By,

Solicitors for Defendants William H. Neblett, Ruby
Neblett, Frank Buren, Helen E. Buren, Thomas
W. McManus, and Ethel B. McManus.

L. R. MARTINEAU, JR., and
WARREN STRATTON,

By,

Solicitors for Defendants Joseph Jensen, Lois W.
Jensen, H. D. Stevens, and Josephine W. Stevens.

BURKE AND HERRON &
RUSSELL GRAHAM,

By,

Solicitors for Defendants William McClintock, El-
len McClintock, Paul Friedman, and Rose K.
Friedman.

In accordance with the foregoing stipulation the
above entitled action is hereby dismissed as to all
parties, and without costs to any party.

Dated August, 1934.

.,
District Judge.

Exhibit No. 11—(Continued)

EXHIBIT "U"

RELEASE

Whereas, an interlocutory decree was on or about November 14, 1933, made and entered in that certain action in the United States District Court for the Southern District of California, Northern Division, which is entitled "Pacific Coast Borax Company, a corporation, Plaintiff, vs. Suckow Borax Mines Consolidated, Inc., a corporation, Defendant" and is numbered In Equity No. D-18-M, and paragraph 3 thereof provides as follows:

"3. That plaintiff recover from the defendant the profits and gains which the defendant has derived, all by reason of the aforesaid infringement of Claim 2 of the aforesaid Letters Patent No. 1,487,806, and that plaintiff recover of said defendant any and all damages which plaintiff has sustained by reason of the said infringement."

The undersigned, Pacific Coast Borax Company, a corporation, for valuable consideration, receipt of which is hereby acknowledged, does hereby release and discharge the said defendant Suckow Borax Mines Consolidated, Inc., a corporation, and the estate in bankruptcy of the said Suckow Borax Mines Consolidated, Inc., and the trustee in bankruptcy of the said estate of and from any and all liability or obligation to account for or pay to the undersigned any profits or gains mentioned in the said paragraph 3, and the undersigned does also waive and relinquish all claim to any and all damages mentioned in the said paragraph 3, and does

Exhibit No. 11—(Continued)

release and discharge the said defendant corporation and its estate and trustee in bankruptcy of and from any and all obligation or liability to perform or comply with all or any of the terms or provisions of said paragraph 3 of the said interlocutory decree, and does acknowledge full satisfaction of all claims and demands for such profits, gains and damages as are therein mentioned.

This instrument shall have no effect whatever upon the adjudications contained in the paragraphs of the said interlocutory decree other than the above quoted paragraph 3.

In Witness Whereof, the said Pacific Coast Borax Company has caused this instrument to be executed by its corporate officers first thereunto duly authorized and its corporate seal to be hereunto affixed this day of August, 1934.

PACIFIC COAST BORAX CO.,
a corporation,

By ,
Vice-President.

Attest:

. ,
Secretary.

State of California,
County of Los Angeles—ss.

On this day of August, 1934, before me, Effie D. Botts, a Notary Public in and for said County and State, residing therein, duly commissioned and

Exhibit No. 11—(Continued)

sworn, personally appeared F. M. Jenifer, known to me to be the Vice-President of Pacific Coast Borax Company, the corporation that executed the within instrument, known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

.....,

Notary Public in and for said County and State.

State of New York,
County of New York—ss.

On this day of August, 1934, before me,, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared F. T. Winters, known to me to be the Secretary of Pacific Coast Borax Company, the corporation which executed the within and annexed instrument known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

.....,

Notary Public in and for said County and State.

Exhibit No. 11—(Continued)

EXHIBIT "V"

In the District Court of the United States for
the Southern District of California, Northern
Division

In Equity No. D-18-M

PACIFIC COAST BORAX COMPANY, a corporation,
ation,

Plaintiff,

vs.

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation,

Defendant.

PARTIAL SATISFACTION OF JUDGMENT

For valuable consideration to the undersigned, Pacific Coast Borax Company, a corporation, in hand paid by Suckow Borax Mines Consolidated, Inc., a corporation, defendant in the above entitled action, partial satisfaction is hereby acknowledged of that certain interlocutory decree herein in favor of plaintiff, Pacific Coast Borax Company, a corporation, and against defendant Suckow Borax Mines Consolidated, Inc., a corporation, which was made and entered on the day of November, 1933, in Judgment Book, at page of the records of this court, to wit, satisfaction is acknowledged with respect only to paragraphs 3, 4 and 6 of the said judgment, all rights under paragraphs 1, 2 and 5 of the said interlocutory decree being ex-

Exhibit No. 11—(Continued)

pressly reserved and no waiver or satisfaction thereof being intended hereby. The Clerk of the said court is hereby authorized and directed to enter partial satisfaction in accordance herewith.

Dated August, 1934.

NEWLIN & ASHBURN,

By,
Attorneys for Plaintiff.

PACIFIC COAST BORAX CO.,
a corporation,

By,
Vice-President.

State of California,
County of Los Angeles—ss.

On this day of August, 1934, before me, Effie D. Botts, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared F. M. Jenifer, known to me to be the Vice-President of Pacific Coast Borax Company, the corporation that executed the within instrument, known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

.,
Notary Public in and for said County and State.

Exhibit No. 11—(Continued)

EXHIBIT "W"

GENERAL RELEASE

Know All Men By These Presents:

That the undersigned, Pacific Coast Borax Company, a Nevada corporation, Borax Consolidated, Ltd., an English corporation, and United States Borax Company, a West Virginia corporation, and each of them, for valuable consideration to them in hand paid, receipt of which is hereby acknowledged, have released and forever discharged and by these presents do, for themselves, their successors and assigns, release and forever discharge John K. Suckow, of Los Angeles, California, his heirs, executors, administrators and assigns, of and from any and all actions and causes of action, claims and demands whatsoever, whether or not well founded in fact or in law, and of and from any and all and all manner of suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, controversies, agreements, promises, trespasses, damages, judgments, executions, claims and demands whatsoever in law or in equity which against the said John K. Suckow, his heirs, executors, administrators and assigns, or any of them, the undersigned have had or now have or which they or the successors or assigns of any of them hereafter can, shall or may have for, upon or by reason of any matter, cause or

Exhibit No. 11—(Continued)

thing whatsoever, whether herein specifically mentioned or otherwise, from the beginning of the world to the date of these presents; and full satisfaction of all of said claims, demands, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, controversies, agreements, promises, trespasses, damages, judgments and executions, is hereby acknowledged.

It is the specific intent and purpose hereof to release and discharge any and all claims and causes of action of any kind or nature whatsoever, whether known or unknown and whether specifically mentioned herein or not, which may exist or might be claimed to exist at or prior to the date hereof, and the undersigned specifically waives any right or claim of right to hereafter assert that any cause of action or alleged cause of action or claim or demand of any nature or kind whatsoever has been, through oversight or error or intentionally or unintentionally, omitted from this release.

In Witness Whereof, said Pacific Coast Borax Company and United States Borax Company have caused this instrument to be executed by their corporate officers first thereunto duly authorized and their corporate seals to be hereunto affixed, and said Borax Consolidated, Ltd. has caused this instru-

Exhibit No. 11—(Continued)

ment to be executed by its attorney-in-fact thereunto duly authorized, the day of July, 1943.

PACIFIC COAST BORAX CO.,
a corporation,

By ,
Vice-President.

Attest:

. ,
Secretary.

UNITED STATES BORAX CO.,
a corporation,

By ,
Vice-President.

Attest:

. ,
Secretary.

BORAX CONSOLIDATED,
LTD., a corporation,

By ,
Its Attorney-in-Fact.

State of California,
County of Los Angeles—ss.

On this day of July, 1943, before me, Effie D. Botts, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared F. M. Jenifer, known to me to be the Vice-President of Pacific Coast Borax Company, the corporation that executed the within

Exhibit No. 11—(Continued)

instrument, known to me to be the person who executed the within instrument, on behalf of the corporation, therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

.....,

Notary Public in and for said County and State.

State of New York,
County of New York—ss.

On this day of July, 1934, before me, , a Notary Public in and for the said County of New York, State of New York, residing therein, duly commissioned and sworn, personally appeared F. T. Winters, known to me to be the Secretary of Pacific Coast Borax Company, the corporation which executed the within and annexed instrument, known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

.....

Notary Public in and for said County and State.

Exhibit No. 11—(Continued)

State of California,
County of Los Angeles—ss.

On this day of July, 1934, before me,
....., a Notary Public in and
for the said County and State, residing therein, duly
commissioned and sworn, personally appeared C. R.
Dudley, known to me to be the Vice-President, and
J. R. Holtum, known to me to be the Secretary of
United States Borax Company, the corporation
which executed the within and annexed instrument,
known to me to be the persons who executed the
within instrument on behalf of the corporation
therein named, and acknowledged to me that such
corporation executed the same.

In Witness Whereof, I have hereunto set my hand
and affixed my official seal the day and year in this
certificate first above written.

.....,
Notary Public in and for said County and State.

State of California,
County of Los Angeles—ss.

On this day of July, 1934, before me, Effie
D. Botts, a Notary Public in and for the said County
and State, residing therein, duly commissioned and
sworn, personally appeared F. M. Jenifer, person-
ally known to me to be the person described in and
whose name is subscribed to the within instrument,
as the attorney-in-fact of Borax Consolidated, Ltd.,
and acknowledged to me that he subscribed the name

Exhibit No. 11—(Continued)

of Borax Consolidated, Ltd. thereto as principal and his own name as attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

.....,
Notary Public in and for said County and State.

EXHIBIT "X"

RELEASE

Whereas, the undersigned, N. V. Chemische Fabrik Gembo, a corporation organized and existing under and by virtue of the laws of the Kingdom of the Netherlands, has heretofore filed its proof of unsecured debt in that certain bankruptcy proceeding now pending in the United States District Court for the Southern District of California, Central Division, numbered 16938-H on the records thereof and entitled "In the Matter of Suckow Borax Mines Consolidated, Inc., a corporation, Alleged Bankrupt", which said claim is in the sum of \$140,000.00, the consideration therefor, as stated in the proof of debt, being "damages arising from the breach of that certain contract made and entered into by and between the bankrupt and N. V. Chemische Fabrik Gembo dated 4th day of September, 1929", being the same contract of which copy is attached to the Bill in Equity in equity cause No. C-107-H, now pending in the said court and entitled "Borax Consolidated, Ltd., a corporation, Plaintiff, vs. Suckow

Exhibit No. 11—(Continued)

Borax Mines Consolidated, Inc., a corporation, John K. Suckow, Defendants''; and

Whereas, valuable consideration has been paid to the undersigned for the execution of this instrument and receipt of said valuable consideration is hereby acknowledged;

Now, Therefore, in consideration of the premises, the undersigned does hereby withdraw its said claim in the said bankruptcy proceeding and its said proof of unsecured debt based thereon, and does also for itself, its successors and assigns, release and forever discharge said Suckow Borax Mines Consolidated, Inc., a corporation, its estate in bankruptcy and its trustee in bankruptcy, and John K. Suckow, his heirs, executors, administrators and assigns, of and from any and all actions and causes of action, claims and demands whatsoever, whether or not well founded in fact or in law, for or on account of any of the matters or things hereinabove mentioned, to wit, alleged damages for breach of the said contract of September 4, 1929, or for or on account of any matter or thing done or omitted by said Suckow Borax Mines Consolidated, Inc., and John K. Suckow, or either of them, under or pursuant to the said contract or claimed to have been done under or pursuant thereto, or for or on account of any omission of the said Suckow Borax Mines Consolidated, Inc. and John K. Suckow, or either of them, with respect to the said contract, it being the purpose and intention hereof to completely relinquish, waive and discharge any and all rights of any nature or kind whatsoever, whether known or unknown, which

Exhibit No. 11—(Continued)

the undersigned may claim to have with respect to the said contract or any breach thereof, or anything done or omitted with respect thereto by the said Suckow Borax Mines Consolidated, Inc. and John K. Suckow, or either of them, and the undersigned does hereby acknowledge full satisfaction of all of said claims, demands and causes of action pertaining to the said contract of September 4, 1929.

In Witness Whereof, the said N. V. Chemische Fabrik Gembo has caused this instrument to be executed by its Managing Director first thereunto duly authorized and its corporate seal to be hereunto affixed, this day of, 1934.

N. V. CHEMISCHE FABRIK
GEMBO,

By,
Its Managing Director.

Consulate General of
United States of America,
Amsterdam, Netherlands—ss.

On this day of, 1934, before me,, a Vice Consul of the United States of America, at Amsterdam in the Kingdom of the Netherlands, personally appeared Jan Albert Koning, personally known to me to be the person described in and whose name is subscribed to the within instrument as the Managing Director of N. V. Chemische Fabrik Gembo, and acknowledged to me that he subscribed the name of said N. V. Chemische Fabrik Gembo thereto as principal, and his own name as Managing Director.

Exhibit No. 11—(Continued)

In Witness Whereof, I have hereunto set my hand and affixed the official seal of the said Consulate at Amsterdam in the Kingdom of the Netherlands the day and year in this certificate first above written.

.....,
Vice Consul of United States of America.

EXHIBIT "Y"

In the District Court of the United States in and for the Southern District of California, Central Division

In Equity No. C-107-H

BORAX CONSOLIDATED, LTD., a corporation,
Plaintiff,

vs.

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation, JOHN K. SUCKOW,
Defendants.

STIPULATION FOR DISMISSAL OF
SUPPLEMENTARY PROCEEDINGS

Whereas, the plaintiff and the judgment debtor, John K. Suckow, have compromised the judgment upon which this court's "Order That Judgment Debtor Appear and Answer Concerning His Property in Supplementary Proceedings" was made on June 7, 1934, and the said examination has been from time to time continued to July, 1934, at ...m.;

Exhibit No. 11—(Continued)

Now, Therefore, in consideration of the premises,

It Is Hereby Stipulated that the said proceeding for examination of the said judgment debtor be forthwith dismissed without costs to either party, and that an order to that effect may be forthwith made without notice by the Judge of the above entitled court or the Special Master before whom the said examination is pending.

Dated August, 1934.

NEWLIN & ASHBURN,

By,
Solicitors for Plaintiff.

HIREM E. CASEY,
FRANK BUREN,
WILLIAM H. NEBLETT,
ARNOLD A. ODLUM,

By,
Solicitors for Defendants.

In accordance with the foregoing stipulation,

It Is Hereby Ordered that the proceeding for the examination of the judgment debtor in supplementary proceedings, which is now pending pursuant to the order of this court made June 7, 1934, be and it hereby is dismissed without costs to either party.

Dated August, 1934.

.,
District Judge.

EXHIBIT No. 12

GENERAL RELEASE OF ALL CLAIMS

Executed December 21, 1942

Know All Men By These Presents:

That the undersigned, Suckow Borax Mines Consolidated, Inc., a Delaware corporation, for valuable consideration to it in hand paid, receipt of which is hereby acknowledged, has released and forever discharged, and by these presents does for itself, its successors and assigns, release and forever discharge Pacific Coast Borax Company, a Nevada corporation, Borax Consolidated, Ltd., an English corporation, and their and each of their stockholders, directors, officers, agents, servants, employees, attorneys-in-fact and attorneys at law, of and from any and all actions and causes of action, claims and demands whatsoever, whether or not well founded in fact or in law, and of and from any and all and all manner of suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, controversies, agreements, promises, trespasses, damages, judgments, executions, claims and demands whatsoever in law or in equity which against the said corporations, or either of them, or against all or any of the stockholders, directors, officers, agents, servants, employees, attorneys-in-fact or attorneys at law of them, or either of them, the undersigned has had or now has or which it or its successors or assigns hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever, whether herein specifically mentioned or otherwise,

Exhibit No. 12—(Continued)

from the beginning of the world to the date of these presents; and full satisfaction of all of said claims, demands, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, controversies, agreements, promises, trespasses, damages, judgments and executions, is hereby acknowledged.

Without limiting the generality of the foregoing release, the undersigned does for itself, its successors and assigns, release and forever discharge said Pacific Coast Borax Company, Borax Consolidated, Ltd., their and each of their stockholders, directors, officers, agents, servants, employees, attorneys-in-fact and attorneys at law, of and from any and all causes of action, claims and demands whatsoever, whether or not well founded in fact or in law, for or on account of any injury or damage to the mine in that certain real property described as Parcel 1 in lease of September 17, 1934, between Suckow Borax Mines Consolidated, Inc., a Delaware corporation, and Hubert F. Laugharn, as Trustee in Bankruptcy of the Estate of said Suckow Borax Mines Consolidated, Inc., as joint lessors, and said Pacific Coast Borax Company, as lessee, which was recorded October 2, 1934, in Book 542, at page 176 of Official Records of Kern County, California, and of and from any and all claims for liability for damage, loss or expense growing or claimed to have grown out of or to have been proximately caused by the caving of the mine in the said Parcel 1 and of and from any liability for the

Exhibit No. 12—(Continued)

results or consequences thereof, past or future, or for injury or damage to all or any of both or either of the parcels of real property described in said lease of September 17, 1934, or any of the appurtenances thereto, fixtures thereon or personal property located thereon or used in connection therewith, together with any and all claims heretofore made or which might have been made on account of anything done, omitted or suffered or alleged to have been done, omitted or suffered by the lessee with respect to the terms of the said lease of September 17, 1934, including claims now unknown to the undersigned as well as known claims; and the undersigned does specifically agree that the said Pacific Coast Borax Company, as lessee of said lease, has performed all of the obligations thereof on its part to be performed, and does release and discharge said Pacific Coast Borax Company, said Borax Consolidated, Ltd., their and each of their stockholders, directors, officers, agents, servants, employees, attorneys-in-fact and attorneys at law, of and from any and all claims, known or unknown, which may now exist or be claimed to exist in favor of the undersigned, as lessor of said lease, against said Pacific Coast Borax Company and said Borax Consolidated, Ltd., or any of them, or against all or any of the stockholders, directors, officers, agents, servants, employees, attorneys-in-fact and attorneys at law of both or either of them; and the undersigned does also release and discharge said Pacific Coast Borax Company and said Borax Consolidated,

Exhibit No. 12—(Continued)

Ltd., and their and each of their stockholders, directors, officers, agents, servants, employees, attorneys-in-fact and attorneys at law of and from any and all causes of action, claims and demands, whether or not well founded in fact or in law, for or on account of the use of the passageways, shaft and other facilities of the mine in said Parcel 1 of said lease for the transportation and lifting of ore mined in premises of Borax Consolidated, Ltd., adjoining the said Parcel 1 and for any other act of commission or omission in or pertaining to the use or occupation of the said leased premises.

It is the specific intent and purpose hereof to release and discharge any and all claims, demands and causes of action of any kind or nature whatsoever, whether known or unknown and whether specifically mentioned herein or not, which may exist or which might be claimed to exist at or prior to delivery hereof in favor of the undersigned as lessor of said lease or in any other capacity, against all or any of the above mentioned corporations and individuals; and the undersigned specifically waives any right or claim of right to hereafter assert that any cause of action or alleged cause of action or claim or demand of any nature or kind whatsoever has been through oversight or error or intentionally or unintentionally omitted from this release.

In Witness Whereof, said Suckow Borax Mines Consolidated, Inc. has caused this instrument to be executed by its corporate officers first thereunto

Exhibit No. 12—(Continued)

duly authorized and its corporate seal to be hereunto affixed, this 21st day of December, 1942.

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation,

By /s/ RUTH Y. SUCKOW
President

Attest:

/s/ PAUL O. TOBELER
Secretary

State of California,
County of Los Angeles—ss.

On this 21st day of December, 1942, before me, the undersigned, a Notary Public in and for the said county and state, residing therein, duly commissioned and sworn, personally appeared Ruth Y. Suckow, known to me to be the President, and Paul O. Tobeler, known to me to be the Secretary of Suckow Borax Mines Consolidated, Inc., the corporation which executed the within and annexed instrument, known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

Witness my hand and official seal.

(Seal) /s/ ROLLAND RICH WOOLLEY,
Notary Public in and for said County and State.

EXHIBIT No. 13

I.R.S. \$374.00 Cancelled.

CORPORATION GRANT DEED

Suckow Borax Mines Consolidated, Inc., a corporation organized under the laws of the State of Delaware, with its principal place of business at Los Angeles, California, in consideration of Ten Dollars (\$10.00) and other valuable consideration, to it in hand paid, receipt of which is hereby acknowledged, does hereby grant to Borax Consolidated, Ltd., an English corporation, the real property in the County of Kern, State of California, described as

Parcel No. 1: An undivided half interest in and to the Southwest quarter and the West one-half of the Southeast quarter of Section 14, Township 11 North, Range 8 West, S.B.B.&M., in the County of Kern, State of California; and

Parcel No. 2: The West one-half of the West one-half of the Northeast quarter of Section 14, Township 11 North, Range 8 West, S. B. B. & M.; and a strip of land 200 feet in width adjoining on the West the last described parcel and constituting the Easterly 200 feet of the East one-half of the Northwest quarter of said Section 14, Township 11 North, Range 8 West, S.B.B.&M.;

In Witness Whereof, said Corporation has caused its corporate name and seal to be affixed hereto and this instrument to be executed by its President and

Exhibit No. 13—(Continued)

Secretary thereunto duly authorized, this 21st day of December, 1942.

(Seal) SUCKOW BORAX MINES CONSOLIDATED, INC.,

By RUTH SUCKOW,
President,

By PAUL O. TOBELER,
Secretary.

State of California,
County of Los Angeles—ss.

On this 21 day of December, 1942, before me Rolland Rich Woolley, a Notary Public in and for said County, personally appeared Ruth Y. Suckow known to me to be the President, and Paul O. Toe-beler known to me to be the Secretary of Suckow Borax Mines Consolidated, Inc., the corporation that executed the within and foregoing instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

Witness my hand and official seal.

(Seal of Ann Cunningham.)

ROLLAND RICH WOOLLEY,
Notary Public in and for said County and State.

CERTIFICATE

Know All Men by These Presents that on the 21st day of December, 1942, the Board of Directors of

Exhibit No. 13—(Continued)

the Suckow Borax Mines Consolidated, Inc., did pass a resolution authorizing the sale of the following described real property together with certain personal property, to the Borax Consolidated, Ltd., an English Corporation, for and in consideration of \$350,000.00, payable \$300,000.00 cash and \$50,000.00 on March 31, 1943, and providing for the release of all claim and interest of Suckow Borax Mines Consolidated, Inc., in and to said property and in and to any leases affecting the same.

Parcel No. 1: An undivided half interest in and to the Southwest quarter and the West one-half of the Southeast quarter of Section 14, Township 11 North, Range 8 West, S. B. B. & M., in the County of Kern, State of California; and

Parcel No. 2: The West one-half of the West one-half of the Northeast Quarter of Section 14, Township 11 North, Range 8 West, S. B. B. & M.; and a strip of land 200 feet in width adjoining on the West the last described parcel and constituting the Easterly 200 feet of the East one-half of the Northwest quarter of said Section 14, Township 11 North, Range 8 West, S. B. B. & M.;

That approval of said resolution was made by written consent of the shareholders of the Suckow Borax Mines, Consolidated, Inc., who are entitled to exercise a majority of the voting power of said corporation.

Exhibit No. 13—(Continued)

Dated: December 23rd, 1942.

(Seal) PAUL O. TOBELER,
Secretary of Suckow Borax Mines Consolidated, Inc.

Recorded at Request of Title Insurance & Trust
Co. Dec. 29, 1942 at 9 a.m. in Book 1111 of Official
Records, Page 327 Kern County Records.

CHAS. H. SHOMATE,
Recorder,

By FRANCES AHMANN,
Deputy Recorder.

Compared by C. Bandussi. Checked by E. Renz.

EXHIBIT No. 14

[Title Insurance and Trust Company Letterhead]
433 South Spring Street, Los Angeles

[Stamp]: Received Jan. 4, 1943, Newlin & Ash-
burn.

Escrow No. 1856404 RG January 2, 1943

Pacific Coast Borax Company,
c/o Newlin & Ashburn,
601 West 5th St., Los Angeles, California.

Gentlemen:

Your escrow with Suckow Borax Mines Con-
solidated Inc.

This escrow was closed on December 29, 1942, and
in accordance with the instructions we enclose:

1. Policy of title insurance No. 76004-K issued

Exhibit No. 14—(Continued)

through our Kern County office with liability of \$340,000.00,

2. Bill of Sale dated December 21, 1942, executed by Suckow Borax Mines Consolidated, Inc., in favor of your Corporation,

3. General Release of All Claims dated December 21, executed by Suckow Borax Mines Consolidated, Inc.,

4. Certified copy of Resolution of Board of Directors of your seller,

5. Certified copy of Minutes of the meeting of the Board of Directors of your seller,

6. Written Consent of stockholders of your seller authorizing the sale of real and personal property,

7. Photostatic copy of lease dated September 17, 1934, between Suckow Borax Mines Consolidated, a corporation, and Hubert F. Laugharn, as trustee,

8. Our checks for \$122.88 and \$12.36, together with statement of your account.

Your deed and recorded copy of surrender of lease will be sent to you direct by the Kern County Recorder.

Very truly yours,

/s/ R. GORMAN,

RG EO

Escrow Department.

EXHIBIT NO. 15

CONSENT OF STOCKHOLDERS OF SUCKOW
BORAX MINES CONSOLIDATED, INC., TO
RELEASE.

Los Angeles, California

December 21, 1942

Suckow Borax Mines Consolidated, Inc.

40 Saint James Park,

Los Angeles, California.

Gentlemen:

The undersigned have carefully examined the attached, proposed escrow instructions of Pacific Coast Borax Company, a Nevada corporation, which for all intents and purposes are hereby made a part of this consent and approval instrument, and for the purposes of this instrument are known as Exhibit A.

From a careful examination of said instrument the undersigned understand that the Pacific Coast Borax Company, a Nevada corporation, desires to purchase from you all of the real property described in said Exhibit A, together with all of the personal property referred to in said Exhibit A and more particularly described in schedule "A" which is attached to that certain lease dated as of September 17th, 1934, referred to in said Exhibit A, and to pay therefor the sum of Three Hundred Fifty Thousand Dollars (\$350,000.00) on or before December 28th, 1942 in the following manner: The sum of Three Hundred Thousand Dollars (\$300,000.00) in cash, and the additional Fifty

Exhibit No. 15—(Continued)

Thousand Dollars (\$50,000.00) to be evidenced by a promissory note in your favor, payable on or before March 31st, 1943.

The undersigned, as stockholders in the Suckow Borax Mines Consolidated, Inc., a corporation, hereby recommend that you immediately do or cause to be done any and all acts and things as are necessary as to immediately accept and consummate a sale of said real and personal property for said consideration within said time; and the undersigned, jointly and severally, hereby consent to said sale for said consideration to be payable in the manner as stated aforesaid and do hereby, jointly and severally, ratify and approve any and all action which may be taken by the Board of Directors of the Suckow Borax Mines Consolidated, Inc., a corporation, in accepting said offer and in consummating said sale and in executing all papers pertaining thereto and in doing or causing to be done any and all things which are necessary to consummate said escrow and said sale.

Each of the undersigned do hereby certify that he has read the attached Exhibit A, in addition to the foregoing contents of this instrument, and that he is thoroughly familiar with the contents thereof and that each of the undersigned is exercising his free and independent judgment in the matter.

The undersigned further certify that they are the owners of record of more than ninety-eight per cent (98%) of all of the issued and outstanding

Exhibit No. 15—(Continued)

common capital stock of Suckow Borax Mines Consolidated, Inc., a corporation, organized and existing under and by virtue of the laws of the State of Delaware and lawfully doing business within the State of California.

| Stockholder | Date | No. of Shares |
|-------------------------------|-------------------|---------------|
| ESTATE OF DR. JOHN K. SUCKOW, | | |
| By /s/ Paul Tobeler, | December 21, 1942 | 31,628 |
| Special Administrator | | |
| /s/ Mrs. Ruth Suckow | December 21, 1942 | 15,863 |
| /s/ Joseph Jensen | December 21, 1942 | 2,569 |
| /s/ Mrs. Lois W. Jensen | December 21, 1942 | 2,503 |

EXHIBIT "A"

ESCROW INSTRUCTIONS

Escrow Number..... December 20, 1942

Title Insurance and Trust Company,
433 South Spring Street,
Los Angeles, California
Gentlemen:

The undersigned, Pacific Coast Borax Company, a Nevada corporation, hereinafter described as "Buyer," delivers to you as escrow holder the following document:

1. Surrender of lease between Suckow Borax Mines Consolidated, Inc. and Pacific Coast Borax Company, dated September 17, 1934, and recorded October 2, 1934, in Book 542, at page 176 of Official Records of Kern County, California, which said lease covers premises described as follows:

Parcel 1: An undivided half interest in and to the southwest quarter and the west one-half of

Exhibit No. 15—(Continued)

the southeast quarter of Section 14, Township 11 North, Range 8 West, S.B.B. & M., in the County of Kern, State of California; and

Parcel 2: The west one-half of the west one-half of the northeast quarter of Section 14, Township 11 North, Range 8 West, S.B.B. & M.; and a strip of land 200 feet in width adjoining on the west the last described parcel and constituting the easterly 200 feet of the east one-half of the northwest quarter of said Section 14, Township 11 North, Range 8 West, S.B.B.&M.; said surrender of lease is in the form hereunto annexed as Exhibit "A."

Upon receipt at any time prior to January 1, 1943, of notice from you that you are ready to close this escrow, buyer will deliver to you as escrow holder, within twenty-four hours thereafter, the following:

(a) \$300,000 and one promissory note made by the undersigned payable to Suckow Borax Mines Consolidated, Inc., or order, for the sum of \$50,000 payable March 31, 1943, which said note shall be in the form hereunto annexed as Exhibit "B";

(b) Certified copy of resolution of the Board of Directors of buyer authorizing the purchase of the above described property at the price and upon the terms herein set forth and the execution and delivery of the foregoing surrender of lease, together with certified copy of Minutes of the meeting of said Board of Directors at which said resolution was passed.

Exhibit No. 15—(Continued)

You are authorized to pay or use said money and deliver said notes to or on the order of the said Suckow Borax Mines Consolidated, Inc., provided you have received, prior to January 1, 1943, for delivery to buyer through this escrow, the following documents and are in position to issue policy of title insurance hereinafter mentioned:

(a) Grant deed duly executed by seller (said Suckow Borax Mines Consolidated, Inc.) conveying to Borax Consolidated, Ltd., an English corporation, all of the real property hereinbefore described, with certificate attached thereto conforming to the provisions of Section 343b of the Civil Code of California;

(b) Bill of sale executed by seller and transferring and conveying to buyer all of the personal property described in Schedule "A" attached to said lease of September 17, 1934, together with any renewals or replacements thereof, and any other personal property belonging to or claimed by seller and now located upon or in any of the real property hereinbefore described, which said bill of sale shall be in the form hereto annexed as Exhibit "C";

(c) Duplicate of the above mentioned surrender of lease of September 17, 1934, in the form of Exhibit "A" attached hereto duly executed by said Suckow Borax Mines Consolidated, Inc. (which duplicate buyer will also execute after delivery by seller into escrow and before recordation thereof);

(d) General release of all claims of seller against

Exhibit No. 15—(Continued)

buyer and said Borax Consolidated, Ltd., their and each of their officers, agents, servants, employees and representatives, which said release shall be in the form of Exhibit "D" attached hereto and duly executed by said Suckow Borax Mines Consolidated, Inc.;

(e) Certified copy of resolution of Board of Directors of seller authorizing the sale of all of the above mentioned real and personal property and the execution and delivery of said grant deed, bill of sale, surrender of lease, general release and other instruments to be delivered to buyer through escrow, together with certified copy of Minutes of the meeting of said Board of Directors at which said resolution was passed; and

(f) Written consent of stockholders of seller authorizing the sale of all of the above mentioned real and personal property for the price and upon the terms herein mentioned, in such form as may be necessary to comply with Section 343 of the Civil Code of California and duly executed by shareholders of seller entitled to exercise a majority of the voting power of such corporation, or such larger proportion of shareholders, or of any class or classes of shareholders, as may be required by the Articles of Incorporation of said seller corporation.

When you are in position:

(a) To issue your policy of title insurance showing good title to all of the above described real property vested in said Borax Consolidated, Ltd.,

Exhibit No. 15—(Continued)

free and clear of defects therein or encumbrances thereon, except the lien of county taxes, with liability limited to \$350,000 and in the form customarily issued by you (but eliminating the phrase "mining claims" from policy exceptions and including any specific provisions which may be necessary to protect buyer against Federal liens of record); and

(b) To comply with all the other requirements of these instructions,

you are authorized and directed to close the escrow, record said deed and surrender of lease and cause same to be later delivered to buyer; you will also deliver to the undersigned upon close of escrow said bill of sale, general release, certified copy of resolution of Board of Directors and written consent of stockholders of seller, together with said policy of title insurance and any other papers deposited by seller as hereinbefore set forth; you will also deliver to seller the said surrender of lease first herein mentioned, together with said certified copy of resolution and minutes of the Board of Directors of buyer corporation, and will pay to or upon the order of the said seller the said sum of \$300,000 and deliver to it or on its order the said promissory note.

The undersigned will pay your charge for said policy of title insurance, all escrow charges and other incidental expenses of this escrow.

If you are unable to comply with these instruc-

Exhibit No. 15—(Continued)

tions prior to January 1, 1943, this escrow shall automatically expire without further notice and all money and documents deposited by buyer shall be returned forthwith to it and without the necessity of any formal demand therefor or notice of termination of escrow.

The office address of buyer, Pacific Coast Borax Company, is Associated Realty Building, Los Angeles, California, and you may communicate with it through its attorney, A. W. Ashburn, of the firm of Newlin & Ashburn, whose office is 1020 Edison Building, Los Angeles California, and whose telephone number is MUtual 7205.

PACIFIC COAST BORAX COMPANY,

By
President

Attest:

.....
Assistant Secretary
Buyer

SURRENDER OF LEASE

This Agreement, made at Los Angeles, California, this.....day of December, 1942, between Suckow Borax Mines Consolidated, Inc., a Delaware corporation, hereinafter designated as "Lessor," and Pacific Coast Borax Company, a Nevada corporation, hereinafter designated as "Lessee,"

Witnesseth:

Whereas, the parties hereto are respectively lessor and lessee of a certain lease entered into under

Exhibit No. 15—(Continued)

date of September 17, 1934, between said Suckow Borax Mines Consolidated, Inc., a Delaware corporation, and Hubert F. Laugharn, as Trustee in Bankruptcy of the Estate of said Suckow Borax Mines Consolidated, Inc., as joint lessors, and said Pacific Coast Borax Company, as lessee; and

Whereas, said Suckow Borax Mines Consolidated, Inc. had been adjudged a bankrupt prior to the making of said lease of September 17, 1934, and the said bankruptcy proceeding was subsequently terminated and dismissed, and said Suckow Borax Mines Consolidated, Inc. thereupon became and now is the sole lessor of and under said lease of September 17, 1934; and

Whereas, the parties hereto have agreed to cancel and terminate the said lease;

Now, Therefore, it is hereby mutually agreed as follows:

1. That the lessee hereby remises, releases, quit-claims and surrenders to the lessor, its successors and assigns forever, all of the premises described in the aforesaid lease, together with the appurtenances and all of the estate and rights of the lessee in and to the said lease and premises.

To Have and To Hold the same unto the lessor, its successors and assigns forever, from and after date of delivery hereof.

This surrender is made with the intent that the said lease and the rights of the lessee thereunder shall merge in the fee of said premises.

2. That the lessor hereby accepts the foregoing

Exhibit No. 15—(Continued)

surrender and hereby releases lessee, and lessee hereby releases lessor, of and from any and all obligation to perform any of the terms of said lease from and after date of delivery hereof and of and from any and all claims, demands and causes of action whatsoever not arising out of or under this agreement of surrender.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their corporate officers first thereunto duly authorized and the respective corporate seals to be hereunto affixed the day and year first above written.

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation,

By RUTH Y. SUCKOW,
President

Attest:

PAUL O. TOBELER
Secretary
Lessor

PACIFIC COAST BORAX COMPANY,
a corporation,

By F. M. JENIFER
President

Attest:

M. J. BARCLAY
Asst. Secretary
Lessee

(To be duly acknowledged)

Exhibit No. 15—(Continued)

EXHIBIT "B"

PROMISSORY NOTE

\$50,000.00

Los Angeles, California, December, 1942.

On or before March 31, 1943, and for value received, the undersigned promises to pay to Suckow Borax Mines Consolidated, Inc., or order, at the office of the undersigned in the Associated Realty Building, Los Angeles, California, the sum of Fifty Thousand and No/100ths Dollars, without interest.

The undersigned further promises to pay all costs of collection, including attorneys' fees, which may be incurred in the collection of this note, or any portion thereof, and, in case suit is instituted for such purpose, the amount of such attorneys' fees shall be such amount as the court shall adjudge reasonable.

PACIFIC COAST BORAX COMPANY,
a corporation,

By
President

Attest:

.....
Asst. Secretary

Exhibit No. 15—(Continued)

EXHIBIT "C"

BILL OF SALE

Be It Known, That the undersigned, Suckow Borax Mines Consolidated, Inc., a Delaware corporation, as party of the first part, for valuable consideration to it in hand paid by Pacific Coast Borax Company, a Nevada corporation, as party of the second part, receipt of which consideration is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, its successors and assigns, all of the personal property described in Schedule "A" attached to that certain lease dated September 17, 1934, between Suckow Borax Mines Consolidated, Inc., a Delaware corporation, and Hubert F. Laugharn, as Trustee in Bankruptcy of the Estate of the said Suckow Borax Mines Consolidated, Inc., as parties of the first part and lessors, and Pacific Coast Borax Company, a Nevada corporation, as party of the second part and lessee, which said lease was recorded on October 2, 1934, in Book 542, at page 176 of Official Records of Kern County, California, and covers the following described premises:

Parcel 1: An undivided half interest in and to the southwest quarter and the west one-half of the southeast quarter of Section 14, Township 11 North, Range 8 West, S.B.B. & M., in the County of Kern, State of California; and

Exhibit No. 15—(Continued)

Parcel 2: The west one-half of the west one-half of the northeast quarter of Section 14, Township 11 North, Range 8 West, S.B.B. & M.; and a strip of land 200 feet in width adjoining on the west the last described parcel and constituting the easterly 200 feet of the east one-half of the northwest quarter of said Section 14, Township 11 North, Range 8 West, S.B.B. & M.;

together with any renewals or replacements of the said or any of the said personal property so described in said Schedule "A" and any other personal property belonging to or claimed by the party of the first part hereto and now located upon any of the real property hereinbefore described.

To Have and To Hold the same unto the said party of the second part, its successors and assigns, forever.

And the party of the first part does for itself, its successors and assigns, covenant and agree to and with the said party of the second part, its successors and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part, its successors and assigns, against all and every person or persons whomsoever lawfully claiming or to claim the same.

In Witness Whereof, said Suckow Borax Mines Consolidated, Inc. has caused this instrument to be executed by its corporate officers first thereunto

Exhibit No. 15—(Continued)

duly authorized and its corporate seal to be hereunto affixed, this.....day of December, 1942.

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation,

By RUTH Y. SUCKOW
President

Attest:

PAUL O. TOBELER
Secretary

(To be duly acknowledged)

EXHIBIT "D"

GENERAL RELEASE OF ALL CLAIMS

Know All Men by These Presents:

That the undersigned, Suckow Borax Mines Consolidated, Inc., a Delaware corporation, for valuable consideration to it in hand paid, receipt of which is hereby acknowledged, has released and forever discharged, and by these presents does for itself, its successors and assigns, release and forever discharge Pacific Coast Borax Company, a Nevada corporation, Borax Consolidated, Ltd., an English corporation, and their and each of their stockholders, directors, officers, agents, servants, employees, attorneys-in-fact and attorneys at law, of and from any and all actions and causes of action, claims and demands whatsoever, whether or not well founded in fact or in law, and of and from any and all and all manner of suits, debts, dues,

Exhibit No. 15—(Continued)

sums of money, accounts, reckonings, bonds, bills, specialties, covenants, controversies, agreements, promises, trespasses, damages, judgments, executions, claims and demands whatsoever in law or in equity which against the said corporations, or either of them, or against all or any of the stockholders, directors, officers, agents, servants, employees, attorneys-in-fact or attorneys at law of them, or either of them, the undersigned has had or now has or which it or its successors or assigns hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever, whether herein specifically mentioned or otherwise, from the beginning of the world to the date of these presents; and full satisfaction of all of said claims, demands, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, controversies, agreements, promises, trespasses, damages, judgments and executions, is hereby acknowledged.

Without limiting the generality of the foregoing release, the undersigned does for itself, its successors and assigns, release and forever discharge said Pacific Coast Borax Company, Borax Consolidated, Ltd., their and each of their stockholders, directors, officers, agents, servants, employees, attorneys-in-fact and attorneys at law, of and from any and all causes of action, claims and demands whatsoever, whether or not well founded in fact or in law, for or on account of any injury or damage to the mine in that certain real property described as Parcel 1

Exhibit No. 15—(Continued)

in lease of September 17, 1934, between Suckow Borax Mines Consolidated, Inc., a Delaware corporation, and Hubert F. Laugharn, as Trustee in Bankruptcy of the Estate of said Suckow Borax Mines Consolidated, Inc., as joint lessors, and said Pacific Coast Borax Company, as lessee, which was recorded October 2, 1934, in Book 542, at page 176 of Official Records of Kern County, California, and of and from any and all claims for liability for damage, loss or expense growing or claimed to have grown out of or to have been proximately caused by the caving of the mine in the said Parcel 1 and of and from any liability from the results or consequences thereof, past or future, or for injury or damage to all or any of both or either of the parcels of real property described in said lease of September 17, 1934, or any of the appurtenances thereto, fixtures thereon or personal property located thereon or used in connection therewith, together with any and all claims heretofore made or which might have been made on account of anything done, omitted or suffered or alleged to have been done, omitted or suffered by the lessee with respect to the terms of the said lease of September 17, 1934, including claims now unknown to the undersigned as well as known claims; and the undersigned does specifically agree that the said Pacific Coast Borax Company, as lessee of said lease, has performed all of the obligations thereof on its part to be performed, and does release and discharge said Pacific Coast Borax Company, said

Exhibit No. 15—(Continued)

Borax Consolidated, Ltd. their and each of their stockholders, directors, officers, agents, servants, employees, attorneys-in-fact and attorneys at law, of and from any and all claims, known or unknown, which may now exist or be claimed to exist in favor of the undersigned, as lessor of said lease, against said Pacific Coast Borax Company and said Borax Consolidated, Ltd., or any of them, or against all or any of the stockholders, directors, officers, agents, servants, employees, attorneys-in-fact and attorneys at law of both or either of them; and the undersigned does also release and discharge said Pacific Coast Borax Company and said Borax Consolidated, Ltd. and their and each of their stockholders, directors, officers, agents, servants, employees, attorneys-in-fact and attorneys at law of and from any and all causes of action, claims and demands, whether or not well founded in fact or in law, for or on account of the use of the passageways, shaft and other facilities of the mine in said Parcel 1 of said lease for the transportation and lifting of ore mined in premises of Borax Consolidated, Ltd. adjoining the said Parcel 1 and for any other act of commission or omission in or pertaining to the use or occupation of the said leased premises.

It is the specific intent and purpose hereof to release and discharge any and all claims, demands and causes of action of any kind or nature whatsoever, whether known or unknown and whether specifically mentioned herein or not, which may

Exhibit No. 15—(Continued)

exist or which might be claimed to exist at or prior to delivery hereof in favor of the undersigned as lessor of said lease or in any other capacity, against all or any of the above mentioned corporations and individuals; and the undersigned specifically waives any right or claim of right to hereafter assert that any cause of action or alleged cause of action or claim or demand of any nature or kind whatsoever has been through oversight or error or intentionally or unintentionally omitted from this release.

In Witness Whereof, said Suckow Borax Mines Consolidated, Inc. has caused this instrument to be executed by its corporate officers first thereunto duly authorized and its corporate seal to be hereunto affixed, this.....day of December, 1942.

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation,

By RUTH Y. SUCKOW
President

Attest:

PAUL O. TOEBLER
Secretary

(To be duly acknowledged)

[Endorsed]: Filed Feb. 2, 1948.

[Title of District Court and Cause.]

NOTICE OF MOTIONS OF DEFENDANT,
AMERICAN POTASH & CHEMICAL COR-
PORATION, TO DISMISS THE COM-
PLAINT, FOR SUMMARY JUDGMENT AND
TO STRIKE PARTS OF THE COMPLAINT.

To Sterling Carr, Esq., and Thurman Arnold, Esq.:
Attorneys for Plaintiffs.

Please Take Notice that on Monday, the 16th day of February, 1948, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, in the Court Room of the above-entitled court before Honorable Michael J. Roche, District Judge, in the Post Office Building in the City and County of San Francisco, State of California, the defendant, American Potash & Chemical Corporation, will make the following motions:

I.

Motion To Dismiss the Complaint on the Ground
That the Action Is Barred by the Statute of
Limitations.

This defendant moves to dismiss the complaint as to each of the plaintiffs on the following grounds:

1. That the action is barred by the Statute of Limitations.

2. That the action is barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.

3. That the action is barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.

4. That the claims for relief alleged in the complaint are barred in that they did not accrue within three years next before the commencement of the action but accrued, if at all, prior to said three years.

5. That the claims for relief alleged in the complaint are barred in that they did not accrue on or after October 11, 1943 but accrued, if at all, prior to said date.

6. That the claims for relief alleged in the complaint are barred in that they did not accrue on or after December 21, 1940 but accrued, if at all, prior to said date.

II.

Motion To Dismiss as to Suckow Borax Mines, Consolidated, Inc., on the Ground That the Action Is Barred by the Statute of Limitations.

In the alternative, if the foregoing motion is denied, this defendant moves to dismiss as to the plaintiff, Suckow Borax Mines Consolidated, Inc., each of the claims for relief alleged by said plaintiff in paragraphs 82 to 94, inclusive, of the complaint on the following grounds:

1. That said claims for relief are barred by the statute of limitations.

2. That said claims for relief are barred by the

provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.

3. That said claims for relief are barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.

4. That the claims for relief alleged in said paragraphs of the complaint on behalf of said plaintiff are barred in that they did not accrue within three years next before the commencement of the action but accrued, if at all, prior to said three years.

5. That the claims for relief alleged in said paragraphs of the complaint on behalf of said plaintiff are barred in that they did not accrue on or after October 11, 1943 but accrued, if at all, prior to said date.

6. That the claims for relief alleged in said paragraphs of the complaint on behalf of said plaintiff are barred in that they did not accrue on or prior to December 21, 1940 but accrued, if at all, prior to said date.

III.

Motion for Summary Judgment.

In the alternative, if the foregoing motions are denied, this defendant moves for summary judgment on the ground that there is no genuine issue as to any material fact and that this defendant is entitled to a judgment as a matter of law. For the purpose of this motion, this defendant joins in the motions for summary judgment of the defendants, Borax Consolidated, Ltd., Pacific Coast Borax

Company, and United States Borax Company, and the affidavits and exhibits accompanying the said motions.

IV.

Motion To Dismiss on the Ground That the Complaint Fails to State a Claim for Relief.

In the alternative, if the foregoing motions are denied, this defendant moves to dismiss the complaint with respect to each of the claims alleged by each of the plaintiffs on the ground that the complaint fails to state a claim upon which relief can be granted.

V.

Motion To Strike Parts of the Complaint.

In the alternative, if the foregoing motions are denied, this defendant moves to strike the following portions of the complaint on the ground that they are, and each of them is, redundant, immaterial and impertinent matter:

1. The last sentence of paragraph 10 of the complaint;
2. All of paragraphs 79 to 82, inclusive of the complaint;
3. All of paragraph 83 of the complaint, and severally the following portions of paragraph 83, namely:
 - (1) Subdivision (a) thereof;
 - (2) Lines 8-21, inclusive, on page 43;

(3) Subdivision (c) thereof to and including the word "result" on line 28, page 45;

(4) Subdivision (d) thereof to and including the word "result" on line 29, page 46;

(5) Subdivision (f) thereof;

(6) Subdivision (g) thereof.

4. All of paragraphs 84 to 94, inclusive, of the complaint.

Dated: February 2, 1948

OLIVER & DONNALLY

By /s/ MICHAEL F. McCARTHY
FULTON, WALTER & HALLEY

By /s/ JOSEPH W. BURNS

/s/ CHARLES A. BEARDSLEY
Attorneys for Defendant, American Potash
& Chemical Corporation.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 2, 1948.

[Title of District Court and Cause.]

Notice of Motions of Bank of America National Trust & Savings Association, as Executor of the Last Will and Testament of Clarence McAniffe Rasor, Deceased, to Quash Service of Summons and to Dismiss for Improper Venue, to Dismiss for Failure to State a Claim upon Which Relief May Be Granted, to Dismiss Because the Action Is Barred by the Statute of Limitations, and to Strike.

To Suckow Borax Mines Consolidated, Inc., Mojave Borax Company, Ltd., Paul O. Tobeler, Executor of the Last Will and Testament of John K. Suckow, Deceased, Ruth E. Suckow, Plaintiffs herein, and to Thurman W. Arnold, Esq., and Sterling Carr, Esq., Attorneys for Plaintiffs:

Please Take Notice, hereby given, that on Monday, the 16th day of February, 1948, at the hour of 10 o'clock A.M., or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled court, before the Honorable Michael J. Roche, District Judge, in the Post Office Building in the City and County of San Francisco, State of California, Bank of America National Trust & Savings Association, a corporation, as Executor of the Last Will and Testament of Clarence McAniffe Rasor, Deceased, hereafter referred to for convenience as Bank of America N. T. & S. A. as Executor, named as a defendant herein, will appear specially for the sole purpose of making the following motions and not otherwise and, so appearing, will move the court as follows:

I.

To Quash Purported Service of Summons made on it on October 1, 1947 in the City of Los Angeles, State of California, and to Dismiss the Action as Against It for Improper Venue, that is, on the ground that it may not be sued in the Northern District of California because (a) jurisdiction of this Court is invoked solely on the ground that the action arises under the laws of the United States, to wit, the Antitrust Laws of the United States as set forth in Title 15 United States Code, and (b) at the time of and at all times since the commencement of this action the Estate of Clarence McAniffe Rasor, Deceased, was and is being administered in the Superior Court of the State of California, in and for the County of Los Angeles, and Bank of America National Trust & Savings Association, as and in its capacity as Executor of the Estate of Clarence McAniffe Rasor, was, ever since has been, and now is, a resident and inhabitant of the City of Los Angeles, County of Los Angeles, in the Southern District of California, and not a resident or inhabitant of the Northern District of California or found therein, and at no such time has had or now has an agent in the Northern District of California.

II.

In the alternative, and if the foregoing motion is denied, To Dismiss the action with respect to the claims asserted by each plaintiff as against Bank of America N. T. & S. A. as Executor on the ground that the complaint fails to state a claim on which

relief can be granted to said plaintiff against it; said motion will be made severally as respects each plaintiff.

III.

In the alternative, if the motion to dismiss for improper venue is denied, To Dismiss the action as against Bank of America N. T. & S. A. as Executor and as respects the claims of each of the plaintiffs on the following grounds:

1. That the action on behalf of each of said plaintiffs is barred by the Statute of Limitations.

2. That the action on behalf of each of said plaintiffs is barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.

3. That the action on behalf of each of said plaintiffs is barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.

4. That the rights of action set forth in the complaint on behalf of each of said plaintiffs did not accrue within three years next before the commencement of the action but accrued, if at all, prior to said three years and are therefore barred by the Statute of Limitations.

5. That the rights of action set forth in the complaint on behalf of each of said plaintiffs did not accrue on or after October 11, 1943 but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

6. That the rights of action set forth in the complaint on behalf of said plaintiffs did not accrue

on or after December 21, 1940 but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

Said motion will be made severally as respects each plaintiff.

IV.

In the alternative, and in the event that none of the foregoing motions is granted with respect to each plaintiff, To Dismiss as against Bank of America N. T. & S. A. as Executor each of the claims for relief and causes of action asserted by the plaintiffs in paragraphs 79, 80 and 82 to 94, inclusive, and each of said paragraphs on the following grounds:

1. That said claims for relief and causes of action are barred by the Statute of Limitations.

2. That said claims for relief and causes of action are barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.

3. That said claims for relief and causes of action are barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.

4. That the rights of action set forth in said portions of the complaint on behalf of said plaintiffs did not accrue within three years next before the commencement of the action but accrued, if at all, prior to said three years and are therefore barred by the Statute of Limitations.

5. That the rights of action set forth in said portions of the complaint on behalf of said plaintiffs did not accrue on or after October 11, 1943

but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

6. That the rights of action set forth in said portions of the complaint on behalf of said plaintiffs did not accrue on or after December 21, 1940 but accrued, if at all, prior to said date and are therefor barred by the Statute of Limitations.

Said motion will be made severally as respects each plaintiff.

V.

In the alternative, and in the event that none of the foregoing motions is granted with respect to each plaintiff, To Grant a Summary Judgment for Bank of America N. T. & S. A. as Executor as against each plaintiff on the ground that there is no genuine issue as to any material fact, and that Bank of America N. T. & S. A. as Executor is entitled to a judgment as a matter of law.

VI.

In the alternative, to Strike from the complaint the following allegations on the ground that they are and each of them is, redundant, immaterial and impertinent matter, to wit:

1. All the allegations of paragraphs 79-94, inclusive, and severally each and every one of the allegations contained in said paragraphs.

2. The words in subdivision (b) of paragraph 83, at lines 10 and 11 on page 43, "and by chicane and false testimony and by other devious means."

3. All of subdivision (c) of paragraph 83 down to, but not including, the words in lines 28 and 29

on page 45 reading, "on March 2, 1933, said Suckow Company was formally adjudged a bankrupt."

4. The words "Through false and fraudulent testimony" in line 22 on page 45 in subdivision (c) of paragraph 83.

5. All of subdivision (d) in paragraph 83 down to, but not including, the words in lines 29 and 30 on page 46 reading, "that on or about the 17th day of April, 1934 and after court proceedings to such end, a lease was granted * * * ."

6. In subdivision (f) of paragraph 83 the first thirteen words reading, "Meanwhile, and in order further to harass said Suckow and said Suckow Company," and the words "said action was commenced with the idea of taking whatever action might be possible to complicate matters further for said Suckow and Suckow Company" in lines 6 to 8 on page 48.

7. All of subsection 8 of subdivision (g) of paragraph 83.

Each of the foregoing motions will be based on all the pleadings and papers on file herein, including this notice of motion. The motions other than the motion to quash service of summons and to dismiss for improper venue will be based on each and all of the affidavits, certified copies of documents and other papers filed herein on February 2, 1948 in support of motions of defendants Pacific Coast Borax Company, Borax Consolidated, Ltd., United States Borax Company, Frank M. Jenifer, and James M. Gerstley to dismiss for failure to state a claim upon which relief may be granted, to dismiss because the action is barred by the Statute of

Limitations, for a summary judgment, and to strike, to wit, the affidavit of Allen W. Ashburn executed January 15, 1948 and attached copy of an affidavit by John K. Suckow, affidavit of Albert H. Bargion executed January 21, 1948, and affidavit of Moses Lasky to which are attached fifteen documents as exhibits.

Date: San Francisco, February 2, 1948.

/s/ MAURICE E. HARRISON

/s/ MOSES LASKY

/s/ BROBECK, PHLEGER & HARRISON

Attorneys for Bank of America N. T. & S. A.
as Executor, etc.

(Acknowledgment of Service.)

[Endorsed:] Filed Feb. 2, 1948.

[Title of District Court and Cause.]

Notice of Motions of Defendants Pacific Coast Borax Company, Borax Consolidated, Ltd., United States Borax Company, Frank M. Jenifer, and James M. Gerstley to Dismiss for Failure to State a Claim upon Which Relief May Be Granted, to Dismiss Because the Action Is Barred by the Statute of Limitations, for a Summary Judgment, and to Strike.

To Suckow Borax Mines Consolidated, Inc., Mojave Borax Company, Ltd., Paul O. Tobeler, Executor of the Last Will and Testament of John K. Suckow, Deceased, Ruth E. Suckow, Plaintiffs herein, and to Thurman W. Arnold, Esq. and Sterling Carr, Esq., Attorneys for Plaintiffs:

Please Take Notice, hereby given, that on Monday, the 16th day of February, 1948, at the hour of 10 o'clock A.M., or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled court, before the Honorable Michael J. Roche, District Judge, in the Post Office Building in the City and County of San Francisco, State of California, defendants Pacific Coast Borax Company, Borax Consolidated, Ltd., United States Borax Company, Frank M. Jenifer, and James M. Gerstley will move the court as follows:

I.

To Dismiss the action with respect to the claims asserted by each plaintiff as against each of the moving defendants on the ground that the complaint fails to state a claim on which relief can be granted to said plaintiff against said defendant; said motion will be made severally as respects each plaintiff and each said defendant.

II.

To Dismiss the action as against each moving defendant and as respects the claims of each of the plaintiffs on the following grounds:

1. That the action on behalf of each of said plaintiffs is barred by the Statute of Limitations.

2. That the action on behalf of each of said plaintiffs is barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.

3. That the action on behalf of each of said

plaintiffs is barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.

4. That the rights of action set forth in the complaint on behalf of each of said plaintiffs did not accrue within three years next before the commencement of the action but accrued, if at all, prior to said three years and are therefore barred by the Statute of Limitations.

5. That the rights of action set forth in the complaint on behalf of each of said plaintiffs did not accrue on or after October 11, 1943 but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

6. That the rights of action set forth in the complaint on behalf of said plaintiffs did not accrue on or after December 21, 1940 but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

Said motion will be made severally as respects each plaintiff and each moving defendant.

III.

In the alternative, and in the event that none of the foregoing motions is granted with respect to each plaintiff, To Dismiss as against each of the moving defendants each of the claims for relief and causes of action asserted by the plaintiffs in paragraphs 79, 80 and 82 to 94, inclusive, and each of said paragraphs, on the following grounds:

1. That said claims for relief and causes of action are barred by the Statute of Limitations.

2. That said claims for relief and causes of action

are barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.

3. That said claims for relief and causes of action are barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.

4. That the rights of action set forth in said portions of the complaint on behalf of plaintiffs did not accrue within three years next before the commencement of the action but accrued, if at all, prior to said three years and are therefore barred by the Statute of Limitations.

5. That the rights of action set forth in said portions of the complaint on behalf of said plaintiffs did not accrue on or after October 11, 1943 but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

6. That the rights of action set forth in said portions of the complaint on behalf of said plaintiffs did not accrue on or after December 21, 1940 but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

Said motion will be made severally as respects each plaintiff and each moving defendant.

IV.

In the alternative, and in the event that none of the foregoing motions is granted with respect to each plaintiff, To Grant a Summary Judgment for each moving defendant as against each plaintiff on the ground that there is no genuine issue as

to any material fact and that the moving parties are entitled to a judgment as a matter of law.

V.

In the alternative, To Strike from the complaint the following allegations on the ground that they are, and each of them is, redundant, immaterial and impertinent matter, to wit:

1. All the allegations of paragraphs 79-94, inclusive, and severally each and every one of the allegations contained in said paragraphs.

2. The words in subdivision (b) of paragraph 83, at lines 10 and 11 on page 43, "and by chicane and false testimony and by other devious means."

3. All of subdivision (c) of paragraph 83 down to, but not including, the words in lines 28 and 29 on page 45 reading, "on March 2, 1933 said Suckow Company was formally adjudged a bankrupt."

4. The words "Through false and fraudulent testimony" in line 22 on page 45 in subdivision (c) of paragraphs 83.

5. All of subdivision (d) in paragraph 83 down to, but not including, the words in lines 29 and 30 on page 46 reading, "that on or about the 17th day of April, 1934 and after court proceedings to such end, a lease was granted * * * ."

6. In subdivision (f) of paragraph 83 the first thirteen words reading, "Meanwhile, and in order further to harass said Suckow and said Suckow Company," and the words "said action was commenced with the idea of taking whatever action might be possible to complicate matters further for said Suckow and Suckow Company" in lines 6 to 8 on page 48.

7. All of subsection 8 of subdivision (g) of paragraph 83.

Each of the foregoing motions will be based on all the pleadings and papers on file herein, including this notice of motion, and upon the following documents accompanying this motion:

1. Affidavit of Allen W. Ashburn executed January 15, 1948, to which is attached copy of affidavit of John K. Suckow presented on January 13, 1930 "In the Matter of the Application of Borax Consolidated, Ltd., a corporation, for Subpoena for Attendance of John K. Suckow Upon Taking his Deposition in the Case of Borax Consolidated, Ltd., a corporation, Plaintiff, vs. John K. Suckow, et al., Defendants, Now Pending in the Superior Court of the State of California, in and for the County of Kern, and No. 20694 on the Records Thereof," being Misc. No. 1469 in the records of the Superior Court of the State of California, in and for the County of Los Angeles.

2. Affidavit of Albert H. Bargion executed January 21, 1948.

3. Affidavit of Moses Lasky in support of motions of defendants, to which is attached the following documents:

(a) As Exhibit 1 thereto, certified copy of "Answer to Bill in Equity" filed by Suckow Borax Mines Consolidated, Inc., a corporation, John K. Suckow, et al. on or about July 15, 1930 in the District Court of the United States in and for the Southern District of California, Central Division, in a case entitled "Borax Consolidated, Ltd., a cor-

poration, plaintiff, vs. Suckow Borax Mines Consolidated, Inc., a corporation, John K. Suckow and N. V. Chemische Fabrik Gembo, a corporation," In Equity No. C-107-M.

(b) As Exhibit 2, certified copy of portion of "Answer to Bill in Equity as Amended," including the whole of the First Affirmative Defense, filed on or about December 8, 1932 in the above-mentioned action No. C-107-M by Suckow Borax Mines Consolidated, Inc. and John K. Suckow.

(c) As Exhibit 3, certified copy of portions of brief filed in said above-entitled equity suit No. C-107-M on December 28, 1933 by John K. Suckow entitled "Defendant John K. Suckow's Brief on Retrial of Cause."

(d) As Exhibit 4, certified copy of transcript of excerpts from printed "Hearings Before a Special Committee on Investigation of Bankruptcy and Receivership Proceedings in United States Courts from June 14 to November 22, 1933 (Seventy Third Congress, Second Session) Pursuant to S. Res. 78, Agreed to by the Senate on the Calendar Day of June 13, 1933, Authorizing the Appointment of a Special Committee to Investigate the Administration of Bankruptcy Proceedings in United States Courts."

(e) As Exhibit 5, certified copy of document entitled "Association of Attorneys" filed on January 12, 1934 in said above-mentioned case No. C-107-H (said case C-107-H being identical with case No. C-107-M).

(f) As Exhibit 6, certified copy of portions of document filed by John K. Suckow in said above-

mentioned equity suit No. C-107-M on January 25, 1934, entitled "Memorandum of John K. Suckow on the Findings of Fact and Conclusions of Law Proposed by Plaintiff."

(g) As Exhibit 7, certified copy of Separate Answer of Ruth E. Suckow, John K. Suckow, Suckow Borax Company, Ltd., Mojave Borax Company, Ltd. and Suckow Borax Mines Consolidated, Inc." to Bill in Equity filed July 18, 1934 in a suit in the District Court of the United States in and for the Southern District of California, Central Division, entitled "Borax Consolidated, Ltd., a corporation, plaintiff, v. Ruth E. Suckow (also known as Ruth Young, Ruth E. Young and Ruth Young Suckow), John K. Suckow, et al., defendants," No. 310-J.

(h) As Exhibit 8, photostatic copy of original document entitled "General Release of All Claims" executed on September 12, 1934 by John K. Suckow and Ruth E. Suckow.

(i) As Exhibit 9, photostatic copy of original document entitled "General Release of All Claims" executed on September 26, 1934 by Suckow Borax Mines Consolidated, Inc.

(j) As Exhibit 10, photostatic copy of original document entitled "General Release of All Claims" executed on September 26, 1934 by Mojave Borax Company, Ltd.

(k) As Exhibit 11, photostatic copy of original agreement entered into August 18, 1934 by and between John K. Suckow and Ruth E. Suckow (sometimes also known as Ruth Young Suckow, Ruth

Young and Ruth E. Young) as Sellers, and Pacific Coast Borax Company as Buyer.

(l) As Exhibit 12, photostatic copy of original document entitled "General Release of All Claims" executed on December 21, 1942 by Suckow Borax Mines Consolidated, Inc. and delivered on January 2, 1943.

(m) As Exhibit 13, certified copy of document entitled "Corporation Grant Deed" executed by Suckow Borax Mines Consolidated, Inc. on December 21, 1942 and recorded on December 29, 1942.

(n) As Exhibit 14, photostatic copy of original letter dated January 2, 1943 to Pacific Coast Borax Company from Title Insurance and Trust Company.

(o) As Exhibit 15, photostatic copy of original document executed on December 21, 1942 by said Paul O. Tobeler as Special Administrator of the Estate of John K. Suckow and Ruth Suckow, as stockholders of Suckow Borax Mines Consolidated, Inc., and all other stockholders of that corporation, addressed to it and authorizing it, inter alia, to make and execute the above grant deed of which Exhibit 13 is a copy and to execute and deliver a release of which Exhibit 12 is a copy.

The originals of the photostatic copies referred to in paragraphs (h), (i), (j), (k), (l), (n) and (o) above are in affiant's possession and custody and will be produced in court upon the hearing of the foregoing motions to be substituted in evidence for

the photostatic copies thereof if the genuineness of the copies is in any way questioned.

Dated: San Francisco, February 2, 1948.

/s/ NEWLIN, HOLLEY, SANDMEYER
& COLEMAN

/s/ MAURICE E. HARRISON

/s/ MOSES LASKY

/s/ BROBECK, PHLEGER & HARRISON
Attorneys for Defendants Borax Consolidated,
Ltd. and certain others.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 2, 1948.

[Title of District Court and Cause.]

Notice of Motions of Defendant West End Chemical Company, a Corporation, to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted, to Dismiss Because the Action is Barred by the Statute of Limitations, for a Summary Judgment, and to Strike.

To Suckow Borax Mines Consolidated, Inc., Mojave Borax Company, Ltd., Paul O. Tobeler, Executor of the Last Will and Testament of John K. Suckow, Deceased, Ruth E. Suckow, Plaintiffs herein, and to Thurman W. Arnold, Esq. and Sterling Carr, Esq., Attorneys for Plaintiffs.

Please take notice, hereby given, that on Monday, the 16th day of February, 1948, at the hour of 10 o'clock a. m., or as soon thereafter as counsel can

be heard, in the courtroom of the above-entitled court, before the Honorable Michael J. Roche, District Judge, in the Post Office Building in the City and County of San Francisco, State of California, defendant West End Chemical Company, a corporation, will move the court as follows:

I.

To dismiss the action with respect to the claims asserted by each plaintiff as against this moving defendant on the ground that the complaint fails to state a claim on which relief can be granted to said plaintiff against this defendant; said motion will be made severally as respects each plaintiff.

II.

To dismiss the action as against this moving defendant and as respects the claims of each of the plaintiffs on the following grounds:

1. That the action on behalf of each of said plaintiffs is barred by the Statute of Limitations.

2. That the action on behalf of each of said plaintiffs is barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.

3. That the action on behalf of each of said plaintiffs is barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.

4. That the rights of action set forth in the complaint on behalf of each of said plaintiffs did not accrue within three years next before the commencement of the action but accrued, if at all, prior

to said three years and are therefore barred by the Statute of Limitations.

5. That the rights of action set forth in the complaint on behalf of each of said plaintiffs did not accrue on or after October 11, 1943 but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

6. That the rights of action set forth in the complaint on behalf of said plaintiffs did not accrue on or after December 21, 1940 but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

Said motion will be made severally as respects each plaintiff and this moving defendant.

III.

In the alternative, and in the event that none of the foregoing motions is granted with respect to each plaintiff, To dismiss as against this moving defendant each of the claims for relief and causes of action asserted by the plaintiffs in paragraphs 79, 80 and 82 to 94, inclusive, and each of said paragraphs, on the following grounds:

1. That said claims for relief and causes of action are barred by the Statute of Limitations.

2. That said claims for relief and causes of action are barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.

3. That said claims for relief and causes of action are barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.

4. That the rights of action set forth in said portions of the complaint on behalf of plaintiffs did not accrue within three years next before the commencement of the action but accrued, if at all, prior to said three years and are therefore barred by the Statute of Limitations.

5. That the rights of action set forth in said portions of the complaint on behalf of said plaintiffs did not accrue on or after October 11, 1943, but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

6. That the rights of action set forth in said portions of the complaint on behalf of said plaintiffs did not accrue on or after December 21, 1940, but accrued, if at all, prior to said date and are therefore barred by the Statute of Limitations.

Said motion will be made severally as respects each plaintiff and this moving defendant.

IV.

In the alternative, and in the event that none of the foregoing motions is granted with respect to each plaintiff, To Grant a Summary Judgment for this moving defendant as against each plaintiff on the ground that there is no genuine issue as to any material fact and that this moving defendant is entitled to a judgment as a matter of law.

V.

In the alternative, To Strike from the complaint the following allegations on the grounds that they are, and each of them is, redundant, immaterial and impertinent matter, to wit:

1. All allegations of paragraphs 79-94, inclusive,

and severally each and every one of the allegations contained in said paragraphs.

2. The words in subdivision (b) of paragraph 83, at lines 10 and 11 on page 43, "and by chicane and false testimony and by other devious means."

3. All of subdivision (c) of paragraph 83 down to, but not including, the words in lines 28 and 29 on page 45 reading, "on March 2, 1933 said Suckow Company was formally adjudged a bankrupt."

4. The words "Through false and fraudulent testimony" in line 22 on page 45 in subdivision (c) of paragraph 83.

5. All of subdivision (d) in paragraph 83 down to, but not including, the words in lines 29 and 30 on page 46 reading, "that on or about the 17th day of April, 1934 and after court proceedings to such end, a lease was granted * * *."

6. In subdivision (f) of paragraph 83 the first thirteen words reading, "Meanwhile, and in order further to harass said Suckow and said Suckow Company," and the words "said action was commenced with the idea of taking whatever action might be possible to complicate matters further for said Suckow and Suckow Company" in lines 6 to 8 on page 48.

7. All of subsection 8 of subdivision (g) of paragraph 83.

Each of the foregoing motions will be based on all the pleadings and papers on file herein, including this notice of motion, and upon all of the affidavits, exhibits, documents and papers heretofore filed, and hereafter to be filed by or on behalf of

defendants Pacific Coast Borax Company, Borax Consolidated, Ltd., United States Borax Company, Frank M. Jenifer, James M. Gerstley, and each of them, and each and every other defendant in connection with any motion or motions similar to any motion or motions hereinabove set forth, which are by reference hereby incorporated herein and made a part hereof.

Dated: Oakland, California, February 2, 1948.

/s/ JOHN L. REITH,

Attorney for defendant West End Chemical Company, a corporation.

(Affidavit of Service By Mail Attached.)

[Endorsed]: Filed Feb. 2, 1948.

* * * *

[Title of District Court and Cause.]

AFFIDAVIT OF PAUL O. TOBELER IN REPLY TO MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Paul O. Tobeler, being first duly sworn, deposes and says:

That he is the Secretary of Suckow Borax Mines Consolidated, Inc., a corporation, one of the plaintiffs above named; that he is the Executor of the Last Will and Testament of John K. Suckow, Deceased, and as such is also one of the plaintiffs above

named; that he has read the affidavits of Moses Lasky, Allan W. Ashburn, and Albert H. Bargion filed herein in support of said motions for summary judgment and to dismiss; that he has examined the exhibits attached to each of such affidavits and is familiar with the contents thereof;

That affiant is informed and believes and therefore alleges as follows, to-wit:

1. That on or about the 12th day of November, 1929 a meeting was held by Messrs. Baker, Johnson, Zabriskie, Stauffer, Wieder and Blumenberg, Jr., in San Francisco, California, in which arrangements, hereinafter described, were made and entered into; that under date of November 12, 1929, said Henry Blumenberg, Jr., telegraphed Erwin R. Dick, in care of Schering Corporation, 110 Williams Street, New York City, by Western Union Telegraph Company, as follows:

“November 12th, 1929

“Mr. Erwin R. Dick,
Schering Corporation,
110 William St.,
New York City.

“Meeting was held in San Francisco Baker Johnson of London Zubrisky of New York Stauffer Wieder of San Francisco and Myself I insisted my contract with German refiners for twenty thousand long tons basis forty four must be lived up to to which Baker promptly agreed stop In addition Stauffer and myself received twenty thousand long tons in America with distinct understanding that Stauffer is not to enter the European markets any

more while Baker did not admit this we are firmly convinced they have an understanding with Trona stop The only large outside interest in Western Borax is the five hundred thousand shares sold to Stauffer which really is only one tenth of total capitalization stop Advise Germans as long as I live Western Borax will never be sold as the value of the property has increased so tremendously that neither Trona or Pacific Coast can afford to buy it I have taken best of care of our German friends and before any further negotiations go on I might be favorably inclined to increase their ten years contract to twenty years if they meet me half way in other matters kindest regards

BLUMENBERG”.

Paid-Charge to: Western Borax Company 566 Sub. Term. Bldg., Los Angeles, Calif.”

2. That said Erwin R. Dick was the United States representative for the German Borax Syndicate known as Deutsche Borax-Vereinigung (herein described as DBV and referred to on page 28 of complaint herein); that the Home office of said DBV was in Hamburg, Germany, and that one Johannes Grasshoff was the Secretary of said DBV; that the cable address of said DBV was “Borax-union”;

That said DBV was a part of said agreements, monopoly and conspiracy described in the complaint and hereinafter referred to;

3. That under date of—New York, October 15, 1929 said Dick telegraphed Henry Blumenberg, Jr.,

in care of Western Borax Company, Los Angeles, California, as per Exhibit 1 hereto attached and made a part hereof; that said BCL referred to in said telegram was Defendant Borax Consolidated, Ltd., and that Trona referred to in said telegram was Defendant American Potash & Chemical Corporation; that wherever in this affidavit BCL and Trona are referred to they are respectively said Borax Consolidated, Ltd., and said American Potash & Chemical Corporation;

4. That under date of November 12, 1929, said Henry Blumenberg, Jr., sent a letter to said Erwin R. Dick, confirming said telegram referred to above, and which letter reads as follows:

“November 12th, 1929.

“Mr. Erwin R. Dick,
Schering Corporation,
110 Williams St.,
New York, N. Y.

My dear Mr. Dick:—

I hereby wish to acknowledge your telegram as per copy enclosed and am attaching also carbon copy of my answer to you which, I trust, is self-explanatory.

It means that Stauffer and ourselves will not go across the Atlantic for any other business except the twenty thousand long tons, 44% basis, that is under contract with our German friends. Likewise. I personally have agreed not to quote in Mexico. But the Japanese, Chinese and all the Asiatic trade will be open to a fair competition. Stauffer re-

ceived the present American Price list which, I believe, is the last one Trona is now selling under. We are not to approach one another's customers except on the basis of the issued price list in America. With one large customer that Stauffer and ourselves have, the price has already been fixed.

“For your information I wish to state that Stauffer and ourselves control the American Box Company fifty-fifty and that I will make about 300 to 500 tons of refined borax at our Mine per month, from my low grade ores that cannot be shipped to Germany and expect Stauffer and the American Borax Company to handle this product. This understanding is between the Stauffer Chemical Co., the West End Chemical Co. (Borax Smith property at Searles Lake) the American Borax Co., the Western Borax Co., and the only outsider now is the Suckow Chemical Co., which, as you know, is already half owned by the Pacic Coast Borax Co. and which, I believe, is lined up for further litigation.

* * * *

Mr. Erwin R. Dick—Cont.

Suckow made a contract in Holland obligating this property that is jointly owned by the Pacific Coast Borax Company and Suckow, taking a certain sum of money in cash which up to the present writing has not been distributed; in other words he kept all of the money instead of turning half of it to the Pacific Coast Borax Co. which he must do according to law. He is taking it all and has over-

looked accounting for the same. As the Pacific Coast Borax Co. owns half undivided interest in this property, you can readily see the trouble that is going to be ahead for both Suckow and the Holland people in the future. I understand the people in Holland have already been notified by the BCL that they owned half of this property.

As stated above, we are firmly convinced that Baker in London and the American Trona have some kind of an agreement to raise prices. You probably know that this has already been done all over Europe except in Germany and they, no doubt, will try to make some deal with the Germans better than they could with us, as I insisted on the maximum requirements under the German Contract and they will probably approach the German Refiners for reduction of this to the minimum. This is a matter, however, for the Germans to handle themselves. Please advise them immediately by cable that I protected them at this end for their full requirements, namely 15,000 long tons to Germany direct and 5000 long tons for Continental Europe as they can sell.

With kindest personal regards,

Sincerely yours,

WESTERN BORAX COMPANY

By Henry Blumenberg, Jr.,

Vice-Pres.

Encl.: 2 Telegram Copies HB:FF."

5. That subsequent thereto and under date of November 27, 1929, said defendants made and entered into, in the City and County of San Fran-

cisco, State of California, a certain Memorandum of Agreement, of which the following is a copy:

“MEMORANDUM OF AGREEMENT

November 27, 1929

Stauffer Chemical Co. to agree not to sell more Borax or Boric Acid than was sold by them with the Borax Union, Inc., American Borax Co., West End Chemical Co., or other associates, during the twelve months to September 30, 1929, and in any case this quantity is not to exceed 12,000 tons of Borax and 2,400 tons of Boric Acid (2000 pounds per ton).

Stauffer Chemical Co. and their associates are not to sell at less than our prices and conditions to be as set for the United States of America, Canada, Japan or other than European countries.

Stauffer Chemical Co. and their associates are not to sell in or for European countries (other than the works in Gernsheim in which Stauffer Chemical Co. are interested).

Each party named as above or otherwise is to, so far as possible, refrain from quoting to or interfering with the customers of the other party or parties.

The Western Borax Company is to confine its operations to filling the requirements called for under their contract with the German refiners (it being understood that this does not exceed 20,000 long tons Rasorite per year basis 44% ABA), and the requirements of Stauffer Chemical Co. and their associates for the production of Borax and Boris Acid as set out above.

Should Stauffer Chemical Co. and their associates not succeed in selling the quantity of Borax named above, the Pacific Coast Borax Co. will take off their hands such unsold Borax, the quantity, of which, however, is not to exceed 3000 tons (2000 pounds), and will pay for the same at the net price ruling at the time of transfer, less the expense of marketing, such as freight and commission.

This arrangement is to be for 12 months from this date, renewable for a further period by mutual agreement to be made not less than 3 months before the expiration of the said period.

.....
.....”

6. That under date of November 27, 1929, the said Blumenberg wrote said Dick a letter in the words and figures following, to-wit:

“Under a Memorandum of Understanding, dated November 27, 1929 and signed by Mr. C. B. Zabris-
kie, Vice-President of the Pacific Coast Borax Company, it was understood and agreed in the following words: ‘The Western Borax Company to confine its operations to fulfill the requirements called for under their Contract with the German Refiners (it being understood that this does not exceed 20,000 long tons Rasorite per year, basis 44% ABA.) and the requirements of the Stauffer Chemical Company and their associates for the production of borax and Boric acid as set out above.

The clause referred to above reads as follows in reference to the Stauffer Chemical Company: ‘Stauffer Chemical Company agrees not to sell more borax

or Boric acid than was sold by them within the Borax Union, Inc., the American Borax Company and the West End Chemical Co. or other associates during the 12 months to September 30th, 1929, and in any case this quantity is not to exceed 13,000 tons of borax and 2400 tons of Boric Acid.'

Now, for further information to your goodself, I wish to state that we receive half of the refining profits of the Stauffer Chemical Company's plant in San Francisco and we also receive half of the refining profits of the American Borax Company of Rochester, Pa. And in addition to that, we are half owners of the American Borax Company in Rochester, so that the Western Borax Company received its initial delivery price on crude ore from the American Borax Company. We then receive half of the refining profits and in addition to that we take also half of the dividends.

This, I trust, will show you conclusively that if the Germans stand for anything less than 20,000 long tons, 44% ABA., they certainly did it of their own volition as I certainly took pretty good care of them at this end at the Conference; I fought for the 20,000 tons all afternoon, Mr. Zabriskie left the meeting about 2 o'clock, consulted with Mr. Baker privately, came back about 5 o'clock in the afternoon and agreed to give us the full German tonnage and put his signature to the same.

The thought has occurred to me, that with our German friends' consent, it might pay you to consult your attorneys in New York and have them write a form of a letter to be addressed to me in

reference what my views are in regard to this 5000 tons of re-sale. I will copy the letter and send it on either to Mr. Grasshoff or yourself and even if you do not use it, it will be a nice matter of reference to have when we meet again on September 30th, 1930.

Now, in reference to my showing the Contract to them, I flatly refused to do so and in evidence of this I am enclosing you carbon copy of my telegram and likewise Mr. Stauffer's telegraphic answer. I did take the Contract to San Francisco, but showed only two or three paragraphs referring to the 20,000 tons and to the price agreed upon and our English friends saw absolutely nothing else and if they say they did, they are making statements which I will be compelled to question.

With kindest personal regards,

Very truly yours,

WESTERN BORAX COMPANY

By Henry Blumenberg, Jr.,

Vice-Pres."

7. That under date of November 14, 1929, said Blumenberg cabled said DBV at Hamburg, as follows:

"Baker expects handle Trona. I am confident Baker and Trona already have some understanding. Our agreement only one year, but we must meet again three months before expiration. Suckow, Burnham not in deal. Lawsuit being prepared against Suckow now. Think Baker doing everything possible to raise prices and stabilize the industry.

This is a very large problem to settle.” (Emphasis ours.)

8. That under date of November 18, 1929, said Johannes Grasshoff of said DBV wrote a letter to Western Borax Company, a copy of which is hereunto annexed, marked Exhibit 2, and made a part hereof; that said letter, according to the stamp thereon, was received by said Western Borax Company on December 3, 1929.

That among the files and records of the action and indictment commenced and secured by the United States Government against Borax Consolidated and others and referred to in paragraph 89, page 60, of the complaint herein, there is on file a copy of a letter dated March 12, 1930 from said A. W. Ashburn, of the legal firm of Newlin & Ashburn, Esqs., one of the attorneys for BCL and PCB, addressed to Mr. William E. Colby, Mills Building, San Francisco, California; that affiant is informed and believes that the original of said letter was introduced in said proceeding and was subsequently impounded by order of the court in which said proceedings were pending, but that a copy thereof now remains in said file; that a copy of said letter is hereunto annexed, marked Exhibit 3, and made a part hereof; that the “bill” referred to in said Ashburn letter was the bill in equity referred to in action No. C-107-M on page 26 of the brief on behalf of Defendants BCL and others filed herein in support of said motion for summary judgment.

That on pages 26 to 35 of said brief of Defend-

ants Borax Consolidated, Ltd., et a., reference is made to an action in the District Court for the Southern District of California, commonly known as the "Equity" action and numbered C-107M. Many quotations appear in such brief from various pleadings in said action filed herein by said Suckow and said Suckow Company in which Defendant Borax Consolidated and other defendants were charged with forming a conspiracy and combination to ruin said Suckow.

That in said action and under date of January 31, 1934 A. W. Ashburn of the firm of Newlin & Ashburn, Esqs., attorneys at law in Los Angeles, California, and representing said Borax Consolidated, Ltd., in said action, addressed a letter to the Honorable Harry A. Hollzer, Judge of the United States District Court, Federal Building, Los Angeles, California, a copy of which is hereunto annexed, marked Exhibit 4, and made a part hereof. Affiant requests that this Court note that in the second paragraph of such letter, said Ashburn denies that plaintiff therein is a monopoly in any sense of the word, and then goes on to state that Defendant American Potash & Chemical Co. is a competitor of said plaintiff. As a matter of fact, said American Potash & Chemical Company was at said time and ever since said Agreement of 1929 a party to said Agreement of '29 and all continuing agreements thereof; every effort is made in said letter to place upon said American Potash & Chemical Company the onus of price cuts and competition.

That on page 35, Subdivision (6) of said brief on behalf of said British defendants reference is made to the Senate Investigating Committee, and on page 37 it is stated that Senator Hebert read a statement by Thomas McManus first Receiver in Bankruptcy of the Suckow Company quoting various portions of said report; that a full copy of said report is hereunto annexed, marked Exhibit 5, and made a part hereof, and from which it will be seen that said Thomas McManus in stating his belief that a conspiracy had been formed by certain of the defendants referred to the conspiracy to institute and carry on said bankruptcy proceeding; it will also be noted that no reference of any kind whatsoever to the '29 conspiracy was made by Mr. McManus.

That attached hereto, marked Exhibit 6, and made a part hereof, is a copy of parts of the Answer to Defendant Borax Consolidated, Ltd., to the petition for an order to show cause why the trustee in bankruptcy should not execute and deliver a lease. This was filed in the matter of Suckow Borax Mines Consolidated, Inc., a corporation, Bankrupt, No. 16,938-H in the District Court of the United States for the Southern District of California, Southern Division. Said answer was filed on or about February 6, 1934. Affiant refers to page 2 of said exhibit commencing with the words "And respondent" down to and including the words "decreased prices" on page 3; also to pages 12 to 17. Affiant also refers to the signatures attached to said answer, namely, Borax Consolidated, Ltd., by F. M. Jenifer, Its

Agent, Respondent and Appearing Specially, Newlin and Ashburn, by A. W. Ashburn, Attorneys for said Respondents so Appearing Specially; also to the fact that said answer was sworn to by said F. M. Jenifer.

That affiant is informed and believes and therefore alleges that on or about the 10th day of January, 1930, said DBV, under its code name, "Borax-union," cabled from Berlin, Germany, to Western Borax Company, Los Angeles, California, certain information set forth in said cable, a copy of which is hereunto annexed, marked Exhibit 7, and made a part hereof; that affiant is also informed and believes and therefore alleges that under date of January 28, 1930, from Hamburg, Germany, Johannes Grasshoff, Secretary of said DBV, wrote a letter to Western Borax Company at Los Angeles, California, a copy of which is hereunto annexed, marked Exhibit 8, and made a part hereof; it will be noted that on the first page of said letter there is a stamp of the Western Borax Company indicating that said letter was received by said Company on the 15th day of February, 1930; that said telegram and letter had reference to the extension of said Agreement of 1929 made in San Francisco and hereinabove referred to.

That affiant is informed and believes and therefore alleges that on or about the 16th day of November, 1932, said Blumenberg of Western Borax Company, Stauffer of Stauffer Chemical Company, and Sherwin of West End Chemical Company met in San Francisco for the purpose of arranging the

yearly renewal of said 1929 Agreement; that Mr. Gurney Newlin, a member of the firm of Newlin & Ashburn, representing Defendants BCL and PCB, was also present; that during the course of said meeting said Newlin telegraphed R. C. Baker, then Managing Director of Defendant BCL, at New York, a copy of which telegram is hereunto annexed, marked Exhibit 9, and made a part hereof;

That during the year 1935 and prior thereto, one William Gauge was an Importer and Exporter doing business in San Francisco, California; that prior to said 1935, said Gauge had entered into a contract with Pacific Coast Borax Company for the purchase and sale of certain borax to be shipped to Japan; that said Gauge was a partner of said Devin referred to in said telegram from said Newlin to said Baker, a copy of which is hereunto annexed and marked Exhibit 9; that at said time, J. M. Gerstley was Assistant to the Vice President of said PCB; that under date of May 10, 1935, said Gerstley in such capacity wrote said Gauge a letter, a copy of which is hereunto annexed, marked Exhibit 10, and made a part hereof. The pencil mark thereon was made by affiant; that affiant is further informed and believes and therefore alleges that on July 8, 1937, said J. M. Gerstley addressed a letter in longhand to said William Gauge, a copy of which is hereunto annexed, marked Exhibit 11, and made a part hereof; that said letter or a copy thereof is on file in the Office of the Clerk of this Court in that certain criminal proceeding referred to in Paragraph 89 of the complaint herein, and which proceeding is numbered 28,900-S;

That said copies of said letters are attached hereto to further demonstrate the fraudulent concealment by defendants of said conspiracy of 1929 as charged in Paragraph 91, page 61, of the complaint herein.

That affiant refers to Paragraph 83, Subdivision (c) of the complaint on file herein, page 43 et seq. thereof, in which it is alleged that one Victor C. Emden was employed by Defendant PCB to assist in bringing about the filing of the said involuntary petition in bankruptcy against said Suckow Company; that various activities by said Emden are charged in the complaint; that affiant is informed and believes and therefore alleges that it was agreed that said Emden should be paid the sum of Ten Thousand Dollars (\$10,000.00) for his fraudulent activities against said Suckow Company. That under date of May 5, 1935, said Defendant PCB addressed a letter to said Emden who was then in New York, a copy of which letter is hereunto annexed, marked Exhibit 12, and made a part hereof; that the receipt accompanying said letter was received by said Emden and signed by him on the 10th of May, 1935; that a copy of said receipt, together with the back attached thereto and on which appear the words "Newlin & Ashburn, 1020 Edison Building, Los Angeles," is hereunto annexed, marked Exhibit 13, and made a part hereof;

That affiant is informed and believes and therefore alleges that the services and disbursements referred to in said receipt were for the activities of said Emden in securing certain false affidavit

and certain signatures to said involuntary petition in bankruptcy, all as set out on pages 44 et seq. of the complaint herein;

That affiant is further informed and believes and therefore alleges that said arrangements with said Emden were made by C. R. Rasor, as agent and representative of PCB.

As to the indictment and civil action secured and brought by the United States Government and referred to in Paragraph 89 of the complaint on file herein: That in said indictment and civil action the following defendants herein were named as defendants therein and in each of said proceedings: Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, American Potash & Chemical Corporation, James M. Gerstley, Frank M. Jenifer and F. C. Baker; that said indictment and said civil action were based upon the 1929 conspiracy constituting the cause of action set forth in the complaint on file herein. That under date of August 16, 1945 said defendants, and each of them, in said criminal proceedings withdrew their plea of not guilty and pleaded nolle contendre and were subsequently fined various amounts by the said court in which said proceeding was pending;

That in said civil action the defendants filed their answers and subsequently agreed with the Government's attorneys upon a consent decree, and under date of August 16, 1945, an order was made to the effect that such consent decree be entered as to all defendants, except one not named herein; that on

said date a final decree as to all of said defendants, with such exception as aforesaid, was filed in this Court; that by said consent decree various obligations and duties were imposed by said court upon certain of said defendants;

That affiant is informed and believes and therefore alleges that the entering of such plea of nolle contendre by said defendants constituted an admission of all of the facts of said indictment.

That on or about the first day of May, 1930, said C. M. Rasor, who is now deceased, made an affidavit in the so-called equity suit then pending in the United States District Court for the Southern District of California, and entitled *Borax Consolidated, Ltd., a corporation, vs. Suckow Borax Mines Consolidated, Inc., a corporation, et al.,* and numbered therein In Equity No. C-107-M; that in said affidavit said C. M. Rasor stated as follows, to-wit:

“It is not true that plaintiff has for years or now does predominate in the borax market of the world nor is it true that defendant Suckow Borax Mines Consolidated, Inc. would be irreparably or at all damaged by an interruption of its operations or that plaintiff would gain in approximately the same or any proportion as defendant claims that it would be damaged thereby. It is true that plaintiff does not control or predominate in the distribution or setting of prices for borax or borax products either in the United States or throughout the world nor is it true that if defendant’s customers were deprived of the supply from the premises described in the complaint, they would be compelled to get

their refined borax from three concerns or approximately three concerns.”

That said affidavit was made in behalf of said BCL, the plaintiff in said equity action; that said Rasor was at said time an agent and one of the directing heads of Defendant PCB; that said affidavit was made approximately six months after the making of said 1929 Agreement referred to hereinabove.

That in certain of the exhibits attached to Mr. Lasky's affidavit, filed in support of these motions, is the statement that at various times Dr. Suckow, or his attorneys, referred to said BCL and other defendants as “the Borax Trust” or “the borax monopoly,” and in this connection affiant alleges that among the trade in the borax industry, and among those dealing in borax, said BCL has been generally known and described as “the Borax Trust,” not with any intent or meaning as a violator of the anti-trust law but in a mere colloquial manner as designating the largest producer of borax then in the commercial field.

AS TO WEST END CHEMICAL COMPANY:

Affiant is informed and believes and therefore alleges that some years ago said West End Chemical Company, herein referred to as West End, and Defendant Stauffer each owned fifty per cent (50%) of Borax Union; that subsequently Stauffer purchased the fifty per cent interest from West End and, thereupon became the owner of all the stock of Borax Union; that in 1940, Stauffer held

over 300,000 shares of West End and at many and different times since 1929 acted as associate and spokesman for said West End, shown, in part, by the correspondence of November 12, 1929 and the Agreement of November 27, 1929, both hereinabove referred to; that at all of said meetings said Stauffer represented said West End; in the Agreement of November 27, 1929, said West End is referred to as an associate of Stauffer; West End is also mentioned in the said telegram of Newlin to Baker, constituting Exhibit 9 hereto attached; that said West End has been a member of said 1929 conspiracy and combination from its inception and, according to affiant's information and belief, continued as such up to approximately the year 1944.

That under date of August 1, 1930, John Stauffer, an officer of said Defendant Stauffer, sent a telegram to said Henry Blumenberg of Defendant Western Borax Company, a copy of which is hereunto annexed, marked Exhibit 14, and made a part hereof; that under date of August 19, 1930, the said Blumenberg replied to the said telegram from said Stauffer, a copy of which is hereunto attached, marked Exhibit 15, and made a part hereof; that the said "S" referred to in said last exhibit (15) was an abbreviation for Dr. Suckow; that affiant is informed and believes and therefore alleges that the said Stauffer, in sending said telegram to said Blumenberg, also represented and acted for Defendant West End Chemical Company.

That affiant is informed and believes and therefore alleges that during the fall of 1930 the ques-

tion of renewing said Agreement of November 27, 1929 arose and that negotiations were had between certain of the defendants in Hamburg, Germany; that pursuant thereto, and under date of September 12, 1930, the said Johannes Grasshoff of said DBV, addressed a letter to Defendant Western Borax Company at Los Angeles, a copy of which letter is hereunto annexed, marked Exhibit 16, and made a part hereof; that attached to said letter was a "Statement of the Conditions for an Agreement for the Year 1931," and which statement is hereunto annexed and forms a part of said Exhibit 16; that the said C. Christoperson & Co., of London, was at said time the European representative of Defendant American Potash & Chemical Corporation, also known as Trona; that a photostatic copy of said Exhibit 16 is attached to the original of this affidavit but that the copies served upon the counsel for defendants herein are plain copies without the letterhead of said Johannes Grasshoff as appearing on said Exhibit 16 so attached to the original of this affidavit.

That affiant is further informed and believes and therefore alleges that under date of January 6, 1931, the said Grasshoff wrote a letter to Defendant Western Borax Company, Ltd., at Los Angeles, a photostatic copy of which is hereto attached to the original of this affidavit and that plain copies are attached to the copies of this affidavit served upon counsel for defendants; that said copy of said letter is marked Exhibit 17 and forms a part hereof; that affiant calls attention to the reference therein

to C. Christopherson & Co., the European representatives of Trona, and also to BCL and the activities of Mr. Baker and his plan to suggest to Dr. Suckow to close his mine; that said letter also refers to various meetings between members of said conspiracy.

/s/ PAUL O. TOBELER.

Subscribed and sworn to before me this 24th day of March, 1948.

(Seal) /s/ LAURA E. HUGHES,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires March 4, 1950.

EXHIBIT No. 1

[Western Union Telegram]

Night Letter New York, October 15, 1929
Mr. Henry Blumenberg Jr.
c/o Western Borax Company
566 Subway Terminal Building
Los Angeles California

Confidential have advise that BCL and Trona have reached agreement in London to increase prices for borax in some European countries except in Germany Stop German refiners have been approached but they make cooperation dependent on substantial increase of German selling price Stop This demand was only partly conceded whereupon German refiners demanded decision not later than second half November Stop Since Trona and BCL got together

Exhibit No. 1—(Continued)

in London it must be assumed that they will come to an arrangement in America especially since representatives of both firms have left London for USA Stop In their future deliberations regarding Borax business I assume they will have to make definite plans regarding their attitude towards you and I expect interesting developments Stop What have you heard about negotiations towards a cooperation between Trona and BCL in America and what is the present status of Trona Stop Have you been approached directly or indirectly and has anything occurred which shows what is in the wind Greetings

DICK

EXHIBIT No. 2

[Johannes Grakhoff Letterhead]

November 18, 1929

[Stamp]: Received Dec. 3, 1929, Western Borax Co.

Letter No. 130

To the Western Borax Company, Los Angeles:

Cable Confirmations Negotiations with
Baker

I confirm the exchange of the following cables between ourselves:

Los Angeles Cable 11.8.1929

“Your contract recognized by BCL for twenty-thousand long basis fortyfour Stauuffer stays out Europe acknowledge—Blumenberg.

I cabled you back as follows, as I wanted more detailed information:

Exhibit No. 2—(Continued)

Hamburg Cable 9. Nov. 1929:

“Your cable received contents not quite comprehensible cannot come to a positive judgment as long as no detailed report to hand”

Los Angeles Cable 11.10.1929

“Mr. Baker Stauffer and ourselves have agreed on policy for America and stauffer is not to quote in Europe and Baker agreed to your fifteen thousand long tons fortyfour basis and fivethousand to sell other refiners in Europe acknowledge”

I acknowledged this cable as follows:

Hamburg Cable 11.13.29.

“German refiners will consent to agreement if following points are satisfactory settled first does agreement include Trona second are Baker and Trona willing to price agreements with German refiners third duration of your agreement fourth what about Suckow and Burnham.”

And here is your answer:

Los Angeles Cable 11.14.29:

“Baker expects handle Trona am confident Baker and Trona already have some understanding our agreement only one year but we must meet again 3 months before expiration (of contract) Suckow Burnham not in deal Lawsuit being prepared against Suckow now think baker doing everthing possible to raise prices and stabilize the industry this is a very large problem to settle.”

Contents of our cable communications I have forwarded to all the Members of the D.B.V. I am now

Exhibit No. 2—(Continued)

anxiously awaiting your letters giving me more detailed information about your negotiations with Mr. Baker.

With kindest personal regards, I remain

Yours very truly

/s/ JOHANNES GRAKHOFF.

EXHIBIT No. 3

March 12, 1930

Mr. William E. Colby,
Mills Bldg., San Francisco, Calif.

My dear Mr. Colby:

Your letter of March 6 and the enclosed opinion relating to the matter of B.C.L. vs. Suckow, were received by me on Monday morning, and I have spent a large part of my time since then studying the matter. I very much appreciate the suggestions which you made and the very exhaustive and able opinion which you submitted. I have redrafted the bill so as to incorporate to the extent of my ability and respects the suggestion which you made, and will forward the redraft of the bill to you, either in this letter or under separate cover.

I have discussed with our client the matter of the partition suit but up to date they have rejected the suggestion because of the improbability of their being able to enforce any bid which Suckow, or his representatives, might make. In other words, he does not have to put up a bond and the only remedy

Exhibit No. 3—(Continued)

would be an action at law to enforce the bid or a resale with an action for the difference; if meantime the property had been bought in at a resale, there would be very little, if anything, of a tangible nature out of which to collect the judgment.

Our client is also advised of the possibility that an accounting action may result in an adverse judgment, but notwithstanding, this fact, has concluded to pursue the matter at this time. Mr. Moreau, the company bookkeeper, made a transcript some months ago of most of Dr. Suckow's books and while the information thus obtained is wholly unsatisfactory, he and Mr. Dudley have so analyzed it as to indicate a very substantial profit on operations prior to the Gembo contract. Suckow, as you know, presented a fair but partial statement of account, during the taking of his deposition. Pursuant to the stipulation there made, Mr. Dudley has obtained or is obtaining, such further information as the Suckow books disclose. Of course, the burden is on him to account and if his books are inadequate, all matters of doubt would be resolved against him as they were in the other suit. Moreover it is extremely unlikely that the accounting suit would result in a money judgment against the Borax Co. If it should appear that the operations had been conducted at a loss (after taking into consideration the capital expenditures, etc.), the best that Suckow could expect would be a judgment to the effect that he have a lien upon the Borax Company's half of the property to the extent of half of the loss, and that upon satisfaction of the

Exhibit No. 3—(Continued)

said lien, half of all of the improvements would belong to the Borax Co. (See *Higgins vs. Eva*, 75 Cal. Dec. 1927). In view of all these matters, it seems advisable to start the action and reduce the matter to a judgment as soon as possible. There are also policy reasons which make it seem to our client desirable to do this. (Emphasis supplied)

I am convinced that we can maintain an equity action and secure an accounting with respect to all of the ore which has been heretofore sold by Suckow, notwithstanding the apparent adverse nature of the McCord decision. I also think it easier to maintain this position in the Federal Court and for many reasons that seems the preferable tribunal. I am not convinced, however, that the measure of net profit would be what Suckow should have received as distinguished from what he did receive for the ore, unless we first establish a definite ouster on his part. Be that as it may, it seems to me that for present purposes we might well rest upon the presumption that notwithstanding the language of the McCord and similar decisions, the statute of Anne has become a part of the law of this state through the adoption of the common law (and on such questions as these the Federal Court is not bound, as I understand it, by the State), and that Suckow, in selling the ore, was at all times trustee or bailiff for the Borax Co. as well as himself and his accountability measured by his actual profits; this position would be advantageous to us in any injunction proceeding.

In other words, I have very substantial doubt of our ability to maintain the action itself and procure

Exhibit No. 3—(Continued)

an accounting, the thing which bothers me, however, is the question of an injunction. After considering your opinion I am more doubtful than ever about our ability to obtain that relief, but this particular consideration appeals to me. Unless motion for temporary injunction is made, Suckow will go along to suit himself, pursuing all of the objectionable practices in which he is now engaged; if we fail in our attempt to procure a temporary injunction, it will be, in my judgment, because of the offer made in that proceeding to segregate the ore, leaving one pile for us to take when we please; you will note that in the redraft of the bill I have sought to discount the effect of such an offer when and if made; in the light of those allegations, I think it reasonably certain that we can, in the event of denial of injunction, procure an order which will be expressly conditioned upon Suckow's making a continuous and fair segregation of the ore. The cost of production at the mouth of the mine is now at least \$3.00 per ton, almost twice the Borax Co.'s cost at its Kramer property. If Suckow has to produce two tons for each ton that he takes, it costs him in cash \$6.00 per ton to perform his Gembo contract before the ore ever left the mouth of the mine, and all that he gets to offset this \$6.00 is a possible lien on the Borax Co.'s half of \$3.00 and the proceeds of the Gembo contract. If our people are right, to the effect that the Gembo contract cannot be performed at a profit in the face of present market prices, this segregation of the ore will break Suckow's back before long. There is only one thing that can prevent it and that

Exhibit No. 3—(Continued)

is an increase in market prices, which would, as you know, be most acceptable to our client. Perhaps this additional order would be the fulcrum by which they could pry Suckow into some kind of sensible cooperation. It seems to me, therefore, it is well worthwhile for us to procure a temporary injunction and that the move cannot result in any real detriment to us. At most, it will give Suckow a temporary flash of victory, which will, however, quickly dissipate when he finds that he is breaking his own back.

Mr. Baker and Mr. Zabriskie will be in San Francisco on one of their customary visits about the first of April. Mr. Baker has it in mind to have a conference of some kind with Suckow at that time and it seems to me that if we should file our suit and have our application for the temporary injunction so noticed that it would be returnable a few days after Mr. Baker's arrival, the stage would be very nicely set for an advantageous conference.

I note what you say about procuring from Suckow a definite refusal to permit the borax company to occupy the premises jointly with him. I have not the deposition before me, but am inclined to think that that testimony, coupled with the attorney's advice there shown and the correspondence about which he there testified, are sufficient to establish an ouster. I never had been able to get a definite Yes or No out of Suckow on anything, and I very much fear that if we made a new demand on him, we would either meet with complete silence, or an equivocal

Exhibit No. 3—(Continued)

answer which would leave us in no better position than that which we now occupy.

I have noted what you said about joining Gembo as a defendant. It seems to me, however, that it is a good tactical move, in the first place, because of the effect on both Suckow and Gembo. Moreover I fear that the Gembo might be held an indispensable party, in which case, its absence would be fatal to the suit; on the other hand, if Gembo is held an improper party, it can be dismissed and no harm has been done to anyone.

I am also sending you with the redraft of the bill a copy of affidavits which I have just received from Mr. Baker and Mr. Johnson, relative to European market prices and conditions. These can, of course, be supplemented by local affidavits as to costs on this side of the water.

As soon as you have had an opportunity to consider this redraft of the bill, I would like to have you get in touch with me by telephone or otherwise, and unless you are entirely satisfied to follow the procedure here outlined, I would like to have a conference with you at the earliest possible date either in San Francisco or Los Angeles as may prove to be mutually convenient.

Yours very truly,

/s/ A. W. ASHBURN,
of Newlin & Ashburn.

cc: to Mr. C. M. Rasor.

EXHIBIT No. 4

Newlin & Ashburn
1020 Edison Building, Los Angeles

January 31, 1934

Honorable Harry A. Hollzer
Judge of the United States District Court
Federal Building, Los Angeles, California

Borax vs. Suckow

My dear Judge Hollzer:

It seems that each change of counsel on the part of defendant involves in some form a reargument of various features of the case already passed upon by your Honor—all without regard to the prescribed method of reviewing erroneous decisions through motion for new trial. The contention now raised by Mr. Neblett's letter to you, dated January 30th, is but a reverberation of some of Mr. Haas' arguments.

The surprising feature of the present contention of counsel is the fact that very slight bona fide investigation would disclose the incorrectness of his principal assertions. To begin with, the plaintiff is not a monopoly in any sense of the word. It produces and markets less than half of the country's production of borax and less than half of the world consumption. Its chief competitor is the American Potash & Chemical Co., commonly known as Trona Corporation, which has its plant at Searles Lake and which produces borax as a mere by-product of its extraction of potash from the waters of the lake. West End Chemical Company is another substantial

Exhibit No. 4—(Continued)

and active competitor, which also produces its borax as a by-product from Searles Lake water. Another competitor is Pacific Alkali Company, whose plant is at Bartlett, California. Not only does the plaintiff not have the greater volume of the business but it is at the mercy of the Trona Corporation and its other competitors as to prices. Production of borax as a by-product enables them to dictate prices, and when Trona concludes, as it frequently does, to reduce the price there is nothing left for the plaintiff to do except to meet the new price in order to hold its business. The statement that prices have risen since the commencement of this litigation is untrue. There have been no changes except in a downward direction and the price today is the lowest in the history of the industry. Moreover, Trona is now engaged in enlarging its plant to an extent which will enable it alone to produce more than half of the world consumption of borax, and in doing so declares itself more interested in increasing distribution than in maintenance of reasonable prices.

The claim that the reason for failure of the borax industry to adopt a code under the National Recovery Act is due to plaintiff's monopolistic control of the business is fantastic. Earnest and prolonged efforts to that end have been made but they have been frustrated by the position taken by the Trona Corporation. The borax industry will, pending the adoption of its own code, operate under the general code pertaining to the chemical industries, which is about

Exhibit No. 4—(Continued)

to be approved and will doubtless become effective at an early date.

It is the plaintiff's purpose to collect its judgment from Dr. Suckow if possible, and the fact that he has made transfers of his property during the pendency of this litigation seems to be now conceded by his legal representative. The mine, it will be recalled, belongs to the bankrupt corporation and not to Dr. Suckow, so that any levy upon the judgment against him can have no effect upon that property or its production. We take it that your Honor will now hold, as heretofore, that the defendant's liability for misappropriation of plaintiff's ore is not affected in the slightest degree by charges that plaintiff is a monopoly, or, to phrase it in the current language, "a big, bad wolf."

That such is the only sound legal viewpoint is definitely established by such cases as *D. R. Wilder Manufacturing Co. v. Corn Products Refining Co.*, 236 U.S. 165, 59 L. Ed. 520, and *A. B. Small Co. v. Lamborn & Co.*, 267 U.S. 248, 69 L. Ed. 597. The case of *Morey v. Paladini*, 187 Cal. 727, which defendant's counsel cites, is not in point. That was an effort to enforce a contract which of itself was in restraint of trade. It represents no legal analogy.

We trust that your Honor will not be misled, by the repeated (but unsupported) asseverations of defendant and his counsel, into a misconception of the true nature of this litigation. It has been established that defendant wrongfully appropriated to his own use the plaintiff's ore, that he owes \$41,000 for

Exhibit No. 4—(Continued)

it and that he has paid no portion of it. After almost four years we have now procured a decision to that effect. If there had been any merit in the present charges, in point of law or fact, ample opportunity has been had to prove it. We are now, we respectfully submit, entitled to a judgment.

We have no desire to prolong a letter-writing debate with counsel for defendant nor to impose such burden upon your Honor, but we are as a matter of courtesy sending a copy of this letter to counsel for defendant.

Very truly yours,

/s/ A. W. ASHBURN,
of Newlin & Ashburn.

EXHIBIT No. 5

REPORT OF THOMAS McMANUS TO SENATE
INVESTIGATION OF 1933

The borax industry of the world was completely revolutionized, immediately subsequent to 1927, by the discovery in the Mojave desert in Kern County, California, of a great deposit of natural sodium borate—to date the only known deposit of this material in existence. This concentration, limited to a small area located seven miles northwest of Kramer and twenty-eight miles due east of the town of Mojave, is estimated by competent engineers to contain enough borax to meet all the industrial,

Exhibit No. 5—(Continued)

commercial and domestic requirements of this most valuable chemical element for the entire world over a period of more than five hundred years.

It is impossible to estimate accurately the potential value of this single source of pure borate, but the series of activities initiated by the British Borax Trust soon after discovery of the deposit by Dr. John K. Suckow of Los Angeles, and culminating in the bankrupting of the Suckow Borax Mines, Consolidated Inc., through the most flagrant chicanery, offers a striking indication of its worth.

Prior to location of the Kramer deposit, Borax Consolidated, Ltd., of London, England, and its subsidiaries, had expended some eighteen millions of dollars in mines in South America and Asia and in development of the borax industry in Death Valley, Calif., but these immense workings, together with all the other large borax refining operations throughout the world, were abandoned following the Mojave desert operations instituted by Dr. Suckow. Before the Suckow discovery, borax was produced by an expensive process in which colemanite—the substance found in the historic Death Valley area—was compounded with soda ash. This and other processes were rendered completely obsolete by the finding of the Kramer deposit.

When Dr. Suckow gave the world a virtually unlimited supply of pure sodium borate, he innocently precipitated what has developed, on the part of the British borax monopolists, one of the most vicious programs of persecution against an individual, as

Exhibit No. 5—(Continued)

a means of annihilating competition with their own interests, that has been recorded in the annals of modern industry.

Borax is essential to life today. It is used in the manufacture of enamels for metal articles such as bathtubs, kitchen fixtures, cooking utensils and laboratory equipment. In the textile industry it is utilized in dyeing as a means of rendering certain cloths fireproof. It is valuable as a flux for welding and brazing metals, and is important in the tanning industry. It also is used in the making of certain type of glass, in the smelting of precious metal concentrates, in assaying, and it has many uses in the home. Complete information on this subject is contained in United States Department of Commerce Bulletin No. 106499, dealing with the general use of borax. The utilization of natural sodium borates increased from three thousand tons in 1921 to 174,510 tons in 1930.

Borax Consolidated, Ltd., the British monopoly, has paid more than eighty millions of dollars in dividends. At present this corporation, with the American Potash and Chemical Corporation, another British concern, is the sole arbiter of the borax business throughout the world. And no page of American industrial history has been written with a darker record of unmerciful aggression than the story of the vicious tactics indulged by Borax Consolidated to stifle all potential competition. From the time that Dr. Suckow discovered borax in the Kramer district he has been pilloried by trumped-

Exhibit No. 5—(Continued)

up litigation that has been climaxed by proceedings through which the monopolists were able to force an adjudication of bankruptcy of his interests—and this without producing a single legitimate claimant to substantial insolvency.

Upon the original discovery of a colemanite borax drift of several feet thickness, in the Kramer district, Dr. Suckow organized what was known as the Suckow Chemical Company, in partnership with the Pacific Coast Borax Company (a Borax Consolidated tenacle) and he later sold his $\frac{1}{4}$ interest in these colemanite workings for \$150,000.00. At that time he had secured locations covering virtually all of the borax bearing lands in the Kramer area. Through litigation he was deprived of a great portion of the borate deposit, and finally was forced to compromise with the Pacific Coast Borax Company and accept an agreement awarding him an undivided one-half interest in 240 acres, in which now is situated the present Suckow Borax Mines Consolidated, Inc.

When Dr. Suckow undertook to develop this 240-acre tract, expecting to be able to agree with the Pacific Coast Company upon equal division of the ore, he met with determined and bitter opposition from the Pacific Coast Company. Advised by his attorneys, Lawler & Degnan, that he was within his rights in instituting development, he began workings, and discovered what is declared to be the only and most valuable deposit of tin-calconite (or crude natural borax) in the entire world. The Pacific

Exhibit No. 5—(Continued)

Company adopted the attitude that no person or other company could operate on the property covered by the undivided-interest agreement without its consent, and, definitely refusing to grant this, immediately launched a campaign of persecution against Dr. Suckow that has dragged him through a receivership, and ultimately, bankruptcy.

As an indication of the length to which the Pacific Company was prepared to go in its determination to throttle and kill all competition, the author of this report, Thomas W. McManus, who served as Receiver for the Suckow interests pending adjudication of the bankruptcy proceedings, was informed by Mr. Jenifer, Vice Pres. & General Manager of the Pacific Company that this concern had offered Dr. Suckow an independent income for life on the condition that he would not attempt to develop the borax lands in which he owns the one-half interest.

My appointment as Receiver, under a petition for involuntary bankruptcy brought in the United States District Court in Los Angeles against Dr. Suckow, was made on July 2, 1931. Information of my appointment came to me in a long distance telephone message from Walter A. Moses, the attorney who brought the bankruptcy petition.

The subsequent maneuvers of Attorney Moses, throughout the constant campaign of intrigue against Dr. Suckow, reveal a striking phase of the borax monopoly's purposes and the ends to which its hirelings will proceed to encompass those purposes.

Exhibit No. 5—(Continued)

Upon notifying me of my appointment, by Federal Judge Hollzer, Attorney Moses advised me, with great emphasis, that I ought not to engage an attorney for the receivership until I had conferred with him. He asserted baldly that it would be greatly to my personal advantage to retain him as counsel.

The same day I received a telephone call from the Pacific Coast Borax Company with a request that I receive a visit from one of their officials, with the company attorney. I informed the company that I would be in Los Angeles the following day to qualify as a receiver, and that upon conclusion of this formality, would meet with them.

Attorney Moses' insistence in his telephone message seemed curiously significant at the time, and later developments disclosed that the significance was of a sinister nature.

Upon my arrival in Los Angeles I called upon Mendel Silverberg and Alex W. Davis his partner—attorneys possessing my complete confidence—and requested them to prepare the necessary proceedings for my qualification as receiver. I further suggested that Attorney Silverberg serve as my counsel as receiver for the Suckow property. He advised me not to appoint an attorney until I had familiarized myself with the situation of the receivership, and suggested that I might wish to select a Bakersfield attorney for this service.

However at my request, Attorneys Silverberg and Davis prepared my qualification as receiver,

Exhibit No. 5—(Continued)

and when my bond was filed, I called upon Attorney Moses.

Attorney Moses inquired into my experience as a receiver. I informed him that I had had no previous experience, upon which he said he thought the Court should have appointed his nominee for this position—an experienced receiver—but as the situation stood, he wished very much to represent me as counsel, in view of his being associated for some of the purported creditors in the Suckow case, and anticipated receiving the bulk of compensation as attorney for the receiver. He stated that while he did not represent the principal creditor, the Pacific Coast Borax Company, he nevertheless was working in cordial cooperation with the company's chief counsel, Allen Ashburn.

He then pointed out to me that as a receiver my compensation would be negligible, and that if I wished to realize a valuable return for my services, I would have to be elected trustee by the creditors, and that he controlled the creditors in this election, and that, finally, if I did not appoint him as attorney, I need not expect to be elected trustee.

Attorney Moses informed me that he would produce a buyer of the Suckow property when the proceedings against Dr. Suckow were completed. From the description of the property given in the petition for Bankruptcy, I was led to believe the value was not great, and so told Attorney Moses. He replied that his potential purchaser—whose identity he would not reveal—would pay a large sum for the Suckow interests.

Exhibit No. 5—(Continued)

This led me to pay an immediate visit to the Suckow Borax Works, and I was considerably surprised, and greatly impressed, upon finding it a well-equipped, efficiently operated plant, the smallest of three companies producing borax in the Kramer area. I appointed the plant foreman, A. Yoder, as custodian of the property, being convinced of his ability and integrity.

Upon returning to Los Angeles I met the secretary of the Suckow Company whom I found to be George S. Green, a former official of the First National Bank of Los Angeles, a former President of the National Exchange Club, and a man of fine reputation, unimpeachable character and real ability. I appointed him to keep charge over the books and office of the company during the receivership. I found that the company's books were under the charge of the Mushet Audit Company, a highly reputable firm of public accountants in Los Angeles; also that the corporation was doing a comparatively small but profitable business, and that there were few past due bills on the records.

Under my employment, the firm of E. M. Berger Company, certified public accountants in Los Angeles, made an inspection of the books of the Suckow Company, and advised me that all records were in order and there was no necessity for a complete audit, and that the statements in an affidavit by one Thomson, a former bookkeeper for the company, reflecting upon the fiscal status, were "utterly absurd."

Exhibit No. 5—(Continued)

These findings baffles me considerable, as they gave me cause to wonder why a receiver, or any proceedings for bankruptcy should be required. I met some of the company's creditors, who informed that their relation with the Suckow corporation had been most satisfactory.

Further investigation convinced me that the action against Dr. Suckow was nothing more than a conspiracy engineered by bankruptcy racketeers in collusion with the Borax Consolidated subsidiary. This conclusion since has been bore out by facts brought to light during hearing of the court proceedings, and of these facts I propose to relate in the later portion of this report.

My immediate action, upon having assured myself that there existed no just cause of a bankruptcy petition against the Suckow Company, was to inform Judge Hollzer that this action was without merit, and that I felt any temporary difficulties that might exist could be corrected with facility. I also informed the Judge that in my opinion the crux of the entire action lay in an effort on the part of Borax Consolidated to eliminate a competitor; that my examination of the Suckow company books indicated that the corporation was solvent; and that certain statements in the petition were false.

Judge Hollzer requested me to keep a close record of any developments pertinent to the case, and if I should find any irregularities, to report them to him. This suggestion of his, which I carried out to the

Exhibit No. 5—(Continued)

letter, is significant particularly from one angle: Later when I was in a position to furnish information substantiating my convictions of fraudulent tactics in connection with the Suckow case, the Special Master hearing evidence in the bankruptcy proceeding contrived to bring about a stipulation that I, as Receiver, was not to be called as a witness at the hearing. Neither was I given an opportunity to place before the district court facts that it is my earnest belief would have, or should have, branded the entire Suckow bankruptcy action as a deliberate program to pauperize this discoverer of the tremendously rich borax deposits that the British monopoly now is garnering millions of dollars from.

I had only one other telephone conversation with Judge Hollzer regarding this matter. At that time I told him the bankruptcy proceedings were unwarranted, "crooked," and that the men who perpetrated this action should be haled before the United States Department of Justice for investigation of their nefarious activities.

My receivership was terminated within a period of forty days, and I was able to establish for the Court that during this period the Suckow property showed a net profit of approximately \$1,500.00, in the face of the fact that international buyers of borax had become apprehensive concerning deliveries because of the reports circulated about Dr. Suckow's purported "insolvency."

It is my purpose here to delve into some of the

Exhibit No. 5—(Continued)

facts and falsehoods that came to light during hearings held upon the Suckow bankruptcy and related proceedings, and in doing so, I wish to make my position clear with reference to my actions during the receivership. I felt that under the law it was my duty to report evidence of fraud where I encountered it—that such evidence was not permitted to be placed in the record is no fault of mine. In this position I received the moral support and friendly advice of such personages as former United States Senator Sam G. Bratton of New Mexico, who prior to his appointment as a Federal Circuit Judge was associated for a time as an attorney of record in the Suckow proceedings; also former United States Senator Samuel M. Shortridge of California; Federal Judge William P. James, and other eminent jurists and counselors. They assured me that it was my duty to report illegal actions that I discovered in the prosecution of the Suckow case, but when I attempted to have light thrown upon these illegal actions in Court, I met with rebuffs ill-chosen, in my opinion, on the part of a Special Master appointed by a Federal Court.

My findings, as Receiver acting in the interests of the Suckow properties, but having no interest in any adjustments other than fair and legal, include the following facts, together with my interpretation of them, and it is easily to be ascertained that my interpretations are concurred in by unquestioned legal authorities:

Exhibit No. 5—(Continued)

1. At the inception of the court action against Dr. Suckow, there were in the entire world only three companies producing borate ore from the Mojave desert deposit, to-wit: the Pacific Coast Borax Company (the subsidiary of the British monopoly); the Western Borax Company, and the Suckow Borax Mines Consolidated. The other British borax concern, American Potash and Chemical Company, produces only refined borax from the brine of Searles Lake, in San Bernardino County, California, not a great distance from the Kramer natural borax deposits. The threat exerted by the powerful monopoly, in its persecution of Dr. Suckow, coupled with certain financial obstacles not germane to this investigation, now has resulted in absorption of the Western company by the Pacific company—in short, the only remaining competitor mining natural borax besides Dr. Suckow, has been bought out by the monopoly.

2. In its Death Valley operations, Borax Consolidated and its subsidiaries prosecuted an unscrupulous campaign that effectively wiped out its competitors. This combine also endeavored virtually by a bald-faced seizure to gain control of the Potash fields of New Mexico, and in this connection it is of interest to note that the monopolists were forced, through the efforts of former Senator Bratton, to satisfy a judgment of approximately one-quarter of a million dollars in which sum the courts found the British concern had injured the discoverers of the potash deposits. And while I am interested in seek-

Exhibit No. 5—(Continued)

ing to have justice done for Dr. Suckow, there is a greater issue at stake in this matter, and that is, that unless the rights of Dr. Suckow are protected and saved to him, the Borax Consolidated will have a complete world monopoly on the borax industry, and will be in a position to dictate without fear or favor prices and all other conditions in the industry. The record of this combine will not permit the unbiased observer to expect anything but a most dictatorial and selfish attitude from Borax Consolidated, if it is permitted to throttle the last threat of competition that remain.

3. Hearing of the petition in bankruptcy against Dr. Suckow was referred by Judge Hollzer to Earl E. Moss, referee in bankruptcy, as Special Master. The hearing before the Special Master consumed thirty-three days, from September 2, 1931. Moss' findings of fact and conclusions of law were filed with Judge Hollzer's court on December 3, 1932. The expenses, presumably to the petitioning creditors, for witnesses, depositions, affidavits and attorney's fees were enormous. Yet it is a manifest fact that none of the creditors of record could meet such expenses, or even furnish creditors' bond. While this phase of the situation caused me considerable wonder at the time, it was only later that it became established that Victor C. Emden of Los Angeles financed the bulk of the incidental activities related to the bankruptcy and other actions, even going to Missouri for the Borax Trust in connection with an equity suit entirely unrelated to the

Exhibit No. 5—(Continued)

bankruptcy matter, to secure one affidavit in 1930, that the affiant, in 1933, deposed was false in many respects, saying that he had signed his name to a "piece of paper" in 1930, which was the affidavit that Victor C. Emden secured, and that affiant did not know what was asserted in this particular affidavit.

4. After the hearing before the Special Master had been in progress some time, and I had made several trips to Los Angeles from Bakersfield to appear as a witness (having originally been subpoenaed), I called upon Mr. Moss and advised him that I was in possession of certain information reflecting upon the integrity of the proceeding that I wished to present to him; that I was not represented by an attorney in the hearing, but that I would like to present these facts. He ordered me from his office and told me that such facts as I had would have to be presented in open Court, which course I assured him I would be very glad to follow. At this time Senator Shortridge and United States Judge Frank H. Kerrigan of San Francisco both counseled me that it was my imperative duty to place any such facts as I had learned before the Court. But the same day that I called upon Special Master Moss, he summoned before him the Attorneys in the case, and caused to be brought about a stipulation that the receiver—myself—should not be called as a witness in the hearing.

5. Among the flagrant discrepancies in the carefully planned testimony adduced during the hear-

Exhibit No. 5—(Continued)

ing, that of some of the “expert” witnesses stood forth as an insult to American jurisprudence. Hoyt Gale testified as expert for the Western Borax Company, and in a report on record before the State Corporation Commissioner brought out that the Western Borax property in the Kramer area was worth many millions of dollars. Yet the “experts” placed values as low as \$45,000.00 on the Suckow properties, which unimpeachable geologists estimate to be worth more than the Western Borax locations.

6. I think it pertinent to direct attention, at this point, to the record of the so-called “creditors” in the Suckow Bankruptcy action. The original petition was signed by the Pacific Iron & Steel Company, Inc., alleging a claim of \$1,200.00. Later this company withdrew from the petition, and it since has been disclosed that this claim was purchased by L. H. Wilson to use as a weapon in the bankruptcy proceeding. H. C. Foltz, operating as the Foltz Electric Company, also signed the petition but received payment of his account with the company. L. E. Ellington alleged a claim of \$88.00 but the Suckow Company produced a cancelled company check made out to Ellington, and endorsed by him as payment for his account. The original petitioning “creditors” were replaced by Suckow stockholders who claimed their stock had been sold to them illegally. Among these was L. H. Wilson, who had a suit on record in the Los Angeles County Superior Court against the Suckow Company when

Exhibit No. 5—(Continued)

the bankruptcy proceedings were instituted, and who joined the latter action as a petitioning creditor. Wilson previous to this time had engaged in a dispute with Dr. Suckow and admitted to me that it was his purpose to gain control of the Suckow mines. H. M. Nice and S. B. Salverson both were former employes of the Suckow company who joined the proceedings as substitute petitioning creditors. It was established that the stock that had been turned over to them consisted of shares personally owned by Dr. Suckow, and so far as has been established, this procedure was not illegal.

7. Along with fictitious creditors and conflicting testimony, the parade of the Suckow bankruptcy complainants produced some remarkable affidavits. Similar documents were introduced in an equity suit brought by Borax Consolidated, Ltd., against the Suckow Company, as the result of Dr. Suckow's workings in the undivided 240-acre tract. J. R. Hughes, one-time plant superintendent, of the Suckow mines, on March 23, 1933, refuted a purported affidavit attributed to him three years previously and which was made much of by Borax Consolidated at the earlier date. The following is quoted from an affidavit signed on every page by Mr. Hughes on March 23, 1933: "Affiant states with reference to the affidavit aforesaid, dated the 29th day of April, 1930, that at about the date thereof, affiant discussed with Victor C. Emden the facts sought to be incorporated into an affidavit and there was incorporated into a form of affidavit facts

Exhibit No. 5—(Continued)

somewhat similar to the facts stated in the said affidavit of April 29, 1930; that the same did not conform to the facts and for that reason this affiant refused to sign the same as prepared; that he thereupon suggested certain corrections in the form as submitted and requested that the same be redrafted in accordance with the truth; that this affiant was in a hurry to leave and at the request of the party seeking the said affidavit, this affiant signed a blank piece of paper with the express understanding and agreement that the substance of the affidavit to be incorporated in a true statement of the facts and affiant's signature affixed thereto; that affiant did not see the said "affidavit" after it was rewritten until he was shown what purported to be a copy thereof this 23rd day of March, 1933; that he has carefully read the same and finds that it contains many discrepancies and inaccuracies to which this affiant would not swear . . . Victor C. Emden claimed to know those things and he was the one interested therein . . . Affiant has never understood that he was doing anything to deprive Dr. Suckow of his property."

And here is another one by Hughes: With reference to the purported affidavit dated the 5th day of June, 1931, affiant states that at the time of his return to California some time prior to the date of the said purported affidavit, affiant was desperately ill; that said Emden came to see this affiant again and asked him to sign a paper for the purpose of effecting the removal of Dr. Suckow

Exhibit No. 5—(Continued)

from the management of the mine in conjunction with other stockholders; that affiant didn't read or remember of signing any affidavit in the bankruptcy proceedings; that affiant never heard of it nor was it ever suggested to him that there was an effort to force the company into bankruptcy . . . That affiant left the employ of the Suckow Company in 1929 and had not been on the property since that time and was in no position to give a report as to the condition of the property as it existed at the later date." . . . Hughes' original "affidavits" which he later refuted, were designed to minimize the value of the Suckow Mines.

8. Beyond all doubt the most astounding claim allowed by Special Master Moss against the Suckow Company to establish its purported "bankruptcy" was one of \$76,922.32 in favor of Dr. Suckow himself. Dr. Suckow denied this claim, emphasizing that he had advanced certain sums for development of the mines, prior to the organization of the company, and that he was to receive his return on these advancements in stock, and had in fact done so. In my entire service as receiver, Dr. Suckow at no time claimed such amount; yet this false claim, based upon allegations in a previous court suit, was included by the Special Master and resulted in a total of liabilities against the Suckow Mines exceeding the assets which the Master saw fit to allow and fix. As a matter of fact, records of the Suckow Company, and statements of its officers and members, indicate that no such sum as \$76,922.32 ever

Exhibit No. 5—(Continued)

was received or expended. Affidavits to this effect were recorded, but were ignored by the Special Master and by Judge Hollzer in his findings. Attorney Moses, for the petitioners, knew that no such sum ever was expended on the Suckow property. This figure was arrived at as a claim in favor of Dr. Suckow through an error made in an affidavit in another proceeding, by Dr. Suckow's own attorney, Walter F. Haas.

9. Another phase of this proceeding that hardly can be adequately described even by "astounding" involved the values of borax ore as fixed by the Court in different actions. In an equity suit brought by the Pacific Coast Borax Company Judge Hollzer issued an order on April 19, 1932, for joint operation of the involved property by the Suckow Mines and the Pacific concerns, and placed the value of the ore underground in the Suckow mine at \$21.89 a ton which was virtually the full amount that the ore was selling for in calcined form in the European markets. But when the time came for adjudication of the bankruptcy action, Judge Hollzer confirmed the findings of Special Master Moss, which placed the value of this very same ore at \$2.50 per ton in the ground. In other words, the Court fixed a value on the ore, in the Equity proceedings, that would prohibit Dr. Suckow from working the property and making a division with the Pacific Company, at the rate of \$21.89 a ton; whereas in the bankruptcy action the court confirmed a valuation that would have allowed the Suckow Mines to operate

Exhibit No. 5—(Continued)

on a basis that would have obviated any possibility of insolvency.

10. Efforts properly to appraise the value of the Kramer borax deposits have led to widely divergent estimates, but there is no question that the insignificant valuations placed upon the Suckow property, and as allowed by the Special Master and Judge Hollzer, are entirely without the pale of reasonable consideration. In his findings, reported to the Federal Court, Mr. Moss assumed that the value of the Suckow Mines could be appraised on the basis of earnings during the depression years of 1930 and 1931. If this rule were applied generally to American business and industry, it is unquestionable that 95% of the companies and enterprises of the country would be found to be worthless; as a matter of fact, the Suckow Company earned a modest but substantial net revenue during these years, which the Master adopted as a yardstick calculated to represent ten per cent of the total valuation. The most conservative estimate that I would conceive, with reference to the Suckow Mines, in the light of the experience as receiver and of various valuations given by engineers, would place the intrinsic worth of Dr. Suckow's holdings at well over one-half million dollars with a potential earning power of millions of dollars, which surely ought to be given consideration in any logical appraisal.

It seems to me a travesty that a development of this nature should be bankrupted, and its discoverer and owner pauperized, through the unscrupulous

Exhibit No. 5—(Continued)

manipulations of a foreign controlled monopoly that will brook no competition—and that this end should be obtained on the strength of fictitious claims. And it must be borne in mind that if the Suckow Mines had not been hampered by this campaign of aggression on the part of Borax Consolidated, through its subsidiaries, the earnings of the property would have been far in excess of the actuality. In the face of this fact that in this limited area of desert lies the only known source of pure borate in the world, and of the fact that Dr. Suckow owns in fee and by agreement a major interest in this essential chemical development, Special Master Moss, in his opinion submitted to the Federal District Court saw fit to observe: “The value of the bankrupt’s interest in 240 acres will therefore be fixed at \$75,000.00, the forty acres owned in fee simple at \$4,000.00, and the machinery and equipment at \$15,000.00.

This opinion on the part of the Special Master seems the more remarkable in view of his own declaration, in the recorded Findings, that, “The opinion of Mr. Jensen, one of the bankrupt’s witnesses, as to the extent of the testimony concerning this unknown quantity, is 857,568 long tons, to which he adds an ore reserve of 220,392 tons, a total of 1,077,960 long tons, the value of which he estimated in three different ways: first, by assuming the production and sale of 9,000 tons of calcined material per year at a profit of \$6.54 per ton, one-half of which would be \$29,430.00, which he capitalizes at ten times, or a total value of \$294,300.00. He also

Exhibit No. 5—(Continued)

assumes the existence of 1,000,000 tons at a value of \$1.00 per ton for the raw ore in the ground, the bankrupt's one-half interest in which would be \$500,000.00, to which he adds certain speculative values and \$125,000.00 for the forty acres owned outright by the bankrupt, arriving at a valuation of \$625,000.00. He next adds \$125,000.00 for the forty acres to the sum of \$294,300.00 previously mentioned, arriving at a value of \$419,300.00."

Having given Mr. Jensen's estimates the stamp of approval, and designating them as "probably as accurate as any of the testimony concerning this unknown quantity," the Special Master proceeds, a few paragraphs further along in his opinion, to adopt arbitrarily a valuation of \$75,000.00, plus \$4,000.00, plus \$15,000.00.

11. In his Findings of Fact and Conclusions of Law, in the bankruptcy proceeding, filed with Judge Hollzer, Special Master Moss found that "The bankrupt at the time of the filing of the petition in bankruptcy herein owed debts in the sum of \$173,897.93 and has assets of the fair valuation of \$113,471.28, and was insolvent." The asserted "debts" cited by Special Master, it should be noted, included \$97,955.00 allowed as a claim against the company in favor of Dr. Suchow—the claim that the physician repudiated on the witness stand and in all of his conversations and correspondence with me—and the claim backed by the attorney for the purported "creditors" upon an inadvertant error in an

Exhibit No. 5—(Continued)

affidavit prepared in another proceeding by Dr. Suckow's own counsel.

It was in this same document that the Special Master, among his conclusions of law, recommended that an order be issued by the Federal Court adjudicating the Suckow Borax Mines Consolidated, Inc., a bankrupt—a conclusion that later was confirmed by Judge Hollzer.

It is worthwhile to take the Master's valuation of all the equipment and buildings and development at \$15,000.00. It is part of the record that Dr. Suckow expended approximately \$75,000.00 on this property before the incorporation of the company; that the stockholders invested and expended approximately an additional amount of \$60,000.00, and probably \$20,000.00 additional was spent from the earnings of the company in developments and improvements. The developments and improvements consist of a double compartment shaft of approximately 435 feet, with a modern electric hoisting equipment, complete calcining plant with equipment, a number of buildings used for living quarters by employees—in fact, a complete plant which evidence indicates shows an investment of \$170,000.00. In addition to these investments, the Master found that Dr. Suckow loaned the corporation \$76,922.43. If this was true, it would make the investment amount to \$246,922.32, which for analectical analysis of the situation rights off for the sum of \$15,000.00. It must be remembered that all this

Exhibit No. 5—(Continued)

time this concern has had to pay these enormous legal expenditures, and still shows a profit.

12. In his report to the Court, the Special Master allowed the Pacific Borax Company a claim of \$26,446.88, deemed to represent the value of one-half of the tonnage of ore taken from the jointly owned undivided land in which Dr. Suckow operated the borax works during the period September, 1927, to June 30, 1931, when the petition in bankruptcy was filed. Prior to launching the borax development on the jointly owned property, Dr. Suckow endeavored with every possible effort reach an understanding with the Pacific Company regarding the division of ore to be taken from the Suckow Mines, but the company not only refused to meet any fair and equitable terms offered by the Doctor, but placed every manner of impediment in the way of his program of development.

13. In his final adjudication of the proceedings, Special Master Moss recommended to the Court a judgment in excess of \$54,000.00 against Dr. Suckow asserted to represent claims and costs. This judgment together with that ordering the bankruptcy, now is on appeal, and while it is the sincere belief of eminent authorities who have become interested in this case from unselfish motives that ultimately justice will be accorded the Suckow Mines; while these proceedings are being drawn out, Dr. Suckow himself has been reduced to penury; he has mortgaged all his real and personal property in an effort to meet the financial drain imposed by the legal

Exhibit No. 5—(Continued)

machinations of the borax trust; and attempts to permit him to retain possession of the Suckow Mines pending settlement of these issues in the higher courts were met by the Special Master with the fixing of a prohibitive bonds, notably a super-sedeas bond of \$63,000.00, ordered by the Court upon the Master's recommendation to stay execution of judgment pending appeal.

It should be cited, at this juncture, that the application for receivership was granted upon posting a bond of only \$500.00, and when attorneys for the alleged bankrupt sought to have the creditors' bond increased to \$3,000.00, the petitioners, through their counsel, Attorney Moses, refused to comply with this proposal.

In a report on this case written August 29, 1933, I find that at the time the judgment was given against Dr. Suckow, and after he had been declared a bankrupt by the Federal Court, the Suckow Borax Mines had orders for "approximately \$150,000.00 worth of borax that he (the doctor) cannot fill and since the absorption of the Western by the Pacific Coast Borax Company, there has been a great demand on Suckow for borax." Here is presented a picture of an operative property equipped to take care of business that would more than meet not only its legitimate obligations but all of the cooked-up fictitious "claims" against it, and at the same time being deprived of operation of the mines through the legal subterfuge of Borax Consolidated, Ltd.

Exhibit No. 5—(Continued)

The same report states that, "The United States Attorney's office (in Los Angeles) developed the fact that the proceedings against Suckow were financed by Victor C. Emden, a very rich racketeer in Los Angeles."

In my most sincere opinion, based upon my knowledge of the entire Suckow proceedings, if the court had accepted from the report I wished to submit in the interests of justice, the Suckow Borax Mines Consolidated never would have been adjudged bankrupt. The burden of this long, torturous trial before a referee in bankruptcy would, in my belief, force bankruptcy upon any business of this magnitude, regardless of how well managed it might be. The matter now is on appeal, and awaiting the findings of a higher court.

I should like to emphasize again that the issues in this series of actions involve more portentous conclusions than fixing the status of the Suckow Borax Mines. They involve a widespread proposition, whether a premeditated campaign by a foreign corporation to eliminate legitimate competition in American industry can be sustained. And whether attorneys at law successfully can prosecute fictitious proceedings and escape the severe censure of the Federal Courts, in these practices. And whether individuals or corporations interested in the purchase of property can convert the processes of the bankruptcy court to force a sale on a sacrificial basis.

It must be emphasized that if the Special Master

Exhibit No. 5—(Continued)

was not on a fee basis, and if it had not been to his financial advantage to find the corporation bankrupt, that a more careful inquiry would have been made in the alleged claims against the Suckow Company, and there would not have been exhibited on the part of the Master an almost unquenching zeal to force into bankruptcy a concern that in fact was truly solvent and in much better financial condition than a great majority of our business concerns of this country during this tragic depression.

I think that possibly it would be well for the Courts to more carefully view the opinions of these men whose fees are many times greater than the salaries received by the Judges of the Federal Court.

Respectfully submitted,

THOMAS W. McMANUS.

EXHIBIT No. 6

In the District Court of the United States,
Southern District of California,
Central Division

Before The Honorable Earl E. Moss, Referee in
Bankruptcy.

No. 16938-H

In the Matter of SUCKOW BORAX MINES CON-
SOLIDATED, INC., a corporation,
Bankrupt.

ANSWER OF BORAX CONSOLIDATED, LTD.,
TO PETITION FOR ORDER TO SHOW
CAUSE WHY TRUSTEE IN BANKRUPTCY
SHOULD NOT EXECUTE AND DELIVER
LEASE

Now comes Borax Consolidated, Ltd., respondent herein, and expressly reserving its objections to the summary jurisdiction of the above-entitled court heretofore made in this proceeding and also the objections to summary jurisdiction made contemporaneously herewith, appears specially herein for the purpose of contesting the jurisdiction of said bankruptcy court herein, and to that end answers the said "Petition for Order to Show Cause Why the Trustee in Bankruptcy Should Not Execute and Deliver a Lease of the Entire Alleged Bankrupt Estate" herein, as follows:

I.

The said petition seeks an ouster of respondent from its present joint possession, in common with

Exhibit No. 6—(Continued)

the trustee, of the mine site and other property owned by the bankrupt and respondent in cotenancy,—a thing which respondent alleges and believes the court has no jurisdiction to authorize or direct. The questions raised by this petition are involved in respondent's pending appeal (hereinafter mentioned) and are therefore matters over which this court does not have jurisdiction at this time.

Respondent further alleges, upon information and belief, that the said alleged offer of Sam W. Small (whose relation, if any, with John K. Suckow, and whose ability to perform, is undisclosed) has been procured and presented for the purpose of assisting in working out an ulterior object of John K. Suckow, namely, coercing this respondent into purchasing the properties of the bankrupt corporation and the said Suckow at an exorbitant figure, and secondly, to avoid the entry or collection of a judgment in favor of plaintiff against John K. Suckow in an amount of more than \$41,000.00 plus interest, which is about to be entered in the equity cause mentioned in the petition herein; that the charges of monopoly and fostering of litigation for monopolistic purposes which are contained in paragraph XI of the said petition are likewise made for said ulterior and sinister purposes.

And respondent further says that it does not have, maintain or control any worldwide or other monopoly in the mining, refining, distribution or sale of borax or borate products or otherwise or at all; that it neither has nor controls as much as one-

Exhibit No. 6—(Continued)

half of the borax or borate products produced in the United States or of the amount thereof produced or consumed in the world; that neither the said John K. Suckow nor the said bankrupt corporation is or has at any time been a competitor of respondent with respect to refined borax; that respondent's chief competitors are, and for a long time have been, American Potash & Chemical Company, West End Chemical Company and Pacific Alkali Company, all of whom produce borax as a by-product of a principal business of extracting potash (in the first two instances) or soda (in the Pacific Alkali instance) from the brines of California lakes; that the said American Potash & Chemical Company is able to and long has fixed prices of borax; that the said prices have never been increased since the commencement of the said equity action and that the only changes which have occurred have been downward; that the price today is the lowest in the history of the industry; that the said American Potash & Chemical Company is now threatening ruinous competition and further decreased prices.

Respondent further says that the said equity cause No. C-107-H was not commenced or maintained for any of the purposes alleged in the petition or for any other purpose except the collection of a legitimate debt owing to it and declaration and enforcement of a lien incidental to the fixing and enforcing of said debt; that it, the said respondent, did not initiate or have any part in the initiation

Exhibit No. 6—(Continued)

or maintenance or prosecution of this bankruptcy proceeding; that the charges that it had any part therein are made for the said ulterior purposes hereinbefore set forth.

That, as hereinafter shown, the said John K. Suckow has in the past endeavored to perpetrate frauds upon respondent (as shown by the final adjudications hereinafter mentioned); that he and the bankrupt corporation as his successor ousted and maintained an ouster against respondent with respect to the jointly owned property, and during the period of the ouster extracted, removed and appropriated to his and its own use a large quantity of ore, one-half of which belonged to respondent; that he and it refused to pay respondent for any portion thereof, and shortly before the trial of the said equity action, wherein their accountability was to be determined, the said John K. Suckow caused the records of the said bankrupt corporation to be changed so as to eliminate therefrom all credits theretofore existing in favor of Pacific Coast Borax Company (which is respondent's agent with respect to the said jointly owned property). Respondent further alleges, upon information and belief, as hereinafter set forth, that during the pendency of the said equity action, and particularly since the decision of Judge Hollzer rendered on December 28, 1933, the said John K. Suckow has made transfers of all of his real properties and stocks in corporations in the above-mentioned equity action in and by its answer filed therein; according to in-

Exhibit No. 6—(Continued)

formation and belief that the cost of so mining and bringing the said ore to the mouth of the shaft would not be less than \$1.50 to \$2.00 per ton and therefore the result of said lessee's mining and setting aside ore for the alleged benefit of respondent would mean the accumulation of a claim of lien in favor of the lessee or the bankrupt against the respondent in a sum of approximately twice the amount conceded by them to be the net worth of the ore at the mouth of the shaft.

VIII.

Respondent denies each and every allegation in paragraph IX of said petition contained.

IX.

Respondent admits that refined or commercial borax is a household article of general use, but denies that this respondent maintains and controls or maintains or controls a world-wide or any monopoly either in the mining, refining, distribution and sale of borax or the mining, refining, distribution or sale of borax, or otherwise or at all; denies, according to information and belief, that the total requirement of the world market for refined borax is 200,000 tons a year or any other amount in excess of approximately 150,000 to 160,000 tons a year. Admits that the borax product mined and sold by this respondent all comes from the Kramer District in Kern County, California, but denies that all or

Exhibit No. 6—(Continued)

any of its product is mined and sold, or mined or sold, in the enjoyment of a great or any monopoly, or that the said respondent has or enjoys a great or any monopoly in the mining and sale, or mining or sale, of borax, or in any other respect whatever. Admits that the bankrupt corporation was mining said contenance property up to the making of said order for joint operation on April 19, 1932, but denies that it conducted any mining in the said property at any time thereafter and alleges that at all times intervening between the said date and the adjudication of bankruptcy herein the said bankrupt voluntarily refrained from mining in the said property or otherwise taking advantage of the terms of said order. Denies that the said bankrupt was at all or any of the said times, or at any other time, engaged in refining or that it did refine all or any of the product of said property. Denies that it has at any time offered respondent any competition whatever in refined borax or that it has been a competitor in refined borax, or that it offered the only competition of respondent in world trade in refined or other form of borax. Denies that calcined borax is refined borax. Denies that this respondent has or had gradually or at all acquired the properties of all or any of its competitors, except that it has recently purchased the property of one of its competitors; and in that connection alleges that respondent produces and/or markets less than one-half of the production of borax in the United States and less than one-half of the world's production

Exhibit No. 6—(Continued)

and/or consumption of the same; that the bankrupt herein is not and never has been respondent's chief competitor; that American Potash and Chemical Company, commonly known as Trona Corporation, is and long has been respondent's chief competitor; that the said Trona Corporation maintains a large and expensive plant at Searles Lake, California, and there produces borax as a mere by-product of its principal business of extraction of potash from the waters of said lake; that West End Chemical Company is another substantial and active competitor of respondent and it also produces borax as a by-product from the waters of Searles Lake; that another competitor of respondent is Pacific Alkali Company, which maintains and operates a plant at Bartlett, California, and there produces borax as a by-product of its principal business of producing soda from the brines of Owens Lake. Not only does respondent not have the greater volume of business but it is at the mercy of Trona Corporation and its other competitors as to prices. Production of borax as a by-product enables them to dictate prices and when Trona concludes, as it has done in the past, to reduce the price of borax there is nothing for respondent to do except to meet the new price in order to hold its business.

Respondent denies that the commencement and/or maintenance of said equity suit which is mentioned in paragraph XI of the petition herein was done to or for the interest of any monopoly, either under

Exhibit No. 6—(Continued)

the control of respondent or otherwise or at all, but on the contrary alleges that, as shown by the annexed opinion of Judge Hollzer, the said action was a bona fide effort to recover the value of the ore belonging to respondent which had been wrongfully appropriated by the bankrupt and John K. Suckow to their own use and benefit. Respondent further denies that it initiated any litigation mentioned in the said petition, except the said equity cause No. C-107-H, and, assuming that the phrase "this litigation" found in paragraph XI of said petition means the said bankruptcy proceeding, respondent specifically denies that it initiated or had any part in the initiation or maintenance or prosecution of the same. Denies that all or any of said alleged things, to wit, the initiation of litigation, were or was done all and solely, or all or solely, for the purpose of maintaining its or any world-wide or other monopoly, either as an English corporation or otherwise or at all, or that said or any of said things were or was done for the purpose of oppressing, harassing and suppressing, or oppressing, harassing or suppressing its sole competitor, or any competitor, either the bankrupt corporation or any other person, firm or corporation, or for the purpose of removing such or any competitor from the field of world or any other competition. Denies that said bankrupt is or has at any time been respondent's sole competitor and denies that all or any of said things were done for the purpose "that he might be removed from the field of world competition" or

Exhibit No. 6—(Continued)

for the purpose of removing the said bankrupt from the field of world competition; and, assuming that the word "he" found in the above quotation from the petition refers to John K. Suckow who has at all times dominated the bankrupt corporation, respondent further denies that all or any of said things were done for the purpose of oppressing, harassing or suppressing the said John K. Suckow either as a competitor or for the purpose of removing him from the field of world or other competition, or otherwise or at all.

Respondent further denies that since this litigation was started or at any time since the commencement of said equity cause No. C-107-H in March, 1930, the price of borax has risen steadily or at all. In this connection respondent further alleges that there have been at no time since March, 1930, any changes in the price of such refined or commercial borax, except in a downward direction and that the price today is the lowest in the history of the industry; that the said Trona Corporation is now engaged in enlarging its plant to an extent which will enable it alone to produce more than one-half of the world consumption of borax; and that it has threatened and is now threatening to market 80,000 tons of borax per year at the expense of other distributors in the industry and regardless of the establishment or maintenance of reasonable prices therefor.

Respondent denies that it has heretofore or that it is now harassing and interfering with or harass-

Exhibit No. 6—(Continued)

ing or interfering with petitioner either in "his" or its management and operation or management or operation of said borax properties, or any of them, or that it is doing or has done any of said things for the purpose of maintaining a British or any monopoly of an American or any other product. Denies that it has threatened and attempted or threatened or attempted to intimidate petitioner's customers, or any of them, and/or the purchasers, or any of the purchasers, of the product from the borax deposits held in cotenancy. Denies that it has demanded from time to time, or at all, that petitioner disclose the names of his customers, except as such demands are incorporated in the bill and other proceedings in the above-mentioned equity cause; and in that connection respondent alleges that as the co-owner of each and every parcel of ore which is extracted from the said mine it has the legal right to participate in the sale, fixing of prices, marketing and delivery thereof, and is entitled not only to know the names of the buyers but also to participate in the fixing of prices and terms. Respondent denies that it has from time to time, or at all, demanded that petitioner join with it, or otherwise, in the maintenance of a world-wide, or any, monopoly, either by determining the output, fixing the price and regulating the marketing, or determining the output or fixing the price or regulating the marketing of all or any of the products of the Kern County borax deposits, or any of them, or that petitioner has declined so to do.

Exhibit No. 6—(Continued)

Further referring to the allegations of paragraph XI of said petition, respondent alleges, according to information and belief, that this proceeding, and particularly the charges of monopoly and of initiating the instant bankruptcy proceedings, contained in the said petition, are now made, as they frequently have been made in the past, in bad faith and for the purpose of coercing this respondent into buying out the properties of the said John K. Suckow and Suckow Borax Mines Consolidated, Inc., at a high price, and for the secondary purpose of avoiding, directly or indirectly, the entry of the judgment against the said John K. Suckow in the said equity cause No. C-107-H in a sum which, computed according to the said opinion of Judge Hollzer, Exhibit "B" hereto, amounts to \$41,109.49, plus interest. That the same charges have been incorporated in a letter written by the attorney for the said bankrupt and the said John K. Suckow under date of January 30, 1934, and addressed to the said Honorable Harry A. Hollzer pertaining to the said equity cause and requesting that on account of such charges the court not only refuse to sign the findings, but also dismiss the action. That because of said ex parte representation to the Judge, respondent's counsel, under date of January 31, 1934, wrote a letter to him, a copy of which is hereunto annexed, marked Exhibit "C" and made a part hereof. Respondent further says that the said charge of actual or attempted monopoly has been made orally or otherwise at practically every stage of the

Exhibit No. 6—(Continued)

said equity cause, which has been pending since March, 1930, but that no evidence to that effect has ever been offered or produced by or on behalf of the said bankrupt corporation or said John K. Suckow, except the uncorroborated conclusions and affidavits of the said John K. Suckow and, as above set forth, the said charges are untrue.

In substantiation of the foregoing allegations, respondent further shows that the said John K. Suckow, personally or through statements made in open court; that the price of ore therein fixed was by the court predicated principally upon stipulations made in open court by the attorney for the defendants as to prices disclosed by the books of the defendant; that immediately after the making of the said order for joint operation the said bankrupt corporation refused to operate under the same and, as hereinbefore set forth, never sought to vacate or modify it until after the adjudication of bankruptcy herein, and its motion, when made, was denied.

Respondent further alleges, according to information and belief, that after the trial of said equity cause, both before and since the decision of Judge Hollzer on December 28, 1933, the said John K. Suckow transferred to other persons and/or corporations practically all of his real properties and his stocks in corporations, and that said transfers were made in fraud of the respondent herein and for the express purpose of preventing its collecting

Exhibit No. 6—(Continued)

the judgment which is about to be entered in the said equity cause in the sum of \$41,109.49, with interest.

BORAX CONSOLIDATED, LTD.,

By /s/ **F. M. JENIFER,**

Its Agent Respondent Appearing
Specially.

NEWLIN & ASHBURN,

By /s/ **A. W. ASHBURN,**

Attorneys for said Respondent so
Appearing Specially.

United States of America,
Southern District of California,
Central Division—ss.

F. M. Jenifer, being by me first duly sworn, deposes and says: that he is the agent of and for Borax Consolidated, Ltd. the above named respondent in the above entitled action; that he has read the foregoing Answer of Borax Consolidated, Ltd., to Petition for Order to Show Cause Why Trustee in Bankruptcy Should not Execute and Deliver Lease, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

That affiant makes this verification on behalf of respondent for the reason that respondent is a corporation and none of its officers is present within

Exhibit No. 6—(Continued)

the state of California, and affiant has knowledge of the facts set forth herein.

/s/ F. M. JENIFER.

Subscribed and sworn to before me this 6th day of February, 1934.

(Seal) /s/ EFFIE D. BOTTS,

Notary Public in and for the County of Los Angeles,
State of California.

District Court of the United States, Southern Dis-
trict of California, Central Division

United States of America,

Southern District of California—ss.

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing is a full, true, and correct photocopy of pages 1, 2, 3, 12, 13, 14, 15, 16, 17, and 27 with verification of Answer of Borax Consolidated, Ltd., to Petition for Order to Show Cause Why Trustee in Bankruptcy Should not Execute and Deliver Lease, being a portion of Referee's Record Book, filed in my office November 8, 1934, in the Matter of Suckow Borax Mines Consolidated, Inc., a corporation, Case No. 16,938-H Bankruptcy, as the same appears from the original record remaining in my office.

Witness my hand and the seal of said Court, this 22nd day of March, A.D. 1948.

[Seal]

EDMUND L. SMITH,

Clerk.

By /s/ F. BETZ, Deputy Clerk.

EXHIBIT No. 7

[Postal Telegraph Form]

SFA979 129 Wireless via RCA

Berlin 1147

1930 Jan 10 AM 12 00

NTL Boron (Western Borax Co. 566 Subway Terminal Bldg) Los Angeles Calif

Negotiations with BCL and Trona resulted in following agreement for this year American and English competitors restrict their sales of refined material in Germany to last year deliveries Stop Maximum deliveries of German refiners fixed at equivalent of fifteen thousand tons fortyfour including borate contract with Poland Stop If German consumption increases our share up to fifteenthousand diminished by actual exports and porate deliveries to Poland hundred percent beyond that quantity our share fifty percent Stop We renounced further borate sales for this year against reduction of Tronas German quota by fivehundred tons Borax and for reasons explained by letter Stop BCL expressly bound not to supply borates to new refiners in Europe Stop German borax prices will be advanced January twentieth allround by three marks.

BORAXUNION.

EXHIBIT No. 8

[Johannes Grasshoff Letterhead]

[Stamp]: Feb 15, 1930, Received, Western Borax Co.

Hamburg, January 28, 1930

Western Borax Company,
Subway Terminal Bldg., Los Angeles, Calif.

Nr. 169

Gentlemen,

I am referring to the enclosed confirmation of cablegrams exchanged about the conference in Berlin and hope that my cable of the 9th inst. from Berlin which was of very detailed contents has informed you about the leading features of the agreement come to with the B.C.L. and Trona.

The negotiations with the representatives of the B.C.L. took place in Berlin on the 6th and 7th inst. and have been exceedingly difficult. The results agreed on finally do not come up to the full extent of the desires of the D.B.V., which are the same as yours, but under the circumstances prevailing they have to be called satisfactory.

As expected, the B.C.L. attributed great importance to the question of crude material-sales through the D.B.V. At first the D.B.V. demanded a right of sale for a quantity up to 5,000 tons Kernite. This demand could not be maintained as the B.C.L., who was exceedingly well informed about the contract entered with you, indicated that the D.B.V. was entitled hereto but not obliged to you. Very surprised

Exhibit No. 8—(Continued)

the D.B.V. asked the representatives of the B.C.L., wherefrom they had this knowledge; they answered that they had become acquainted with the contents of the contract to the full extent during their negotiations with you. This knowledge of our contract has made the negotiations extremely difficult.

The position of the D.B.V. in the crudematerial-question was complicated very much by the fact, that the crudematerial shipped by you at the time being is not of equal quality to that shipped by the B.C.L.! I do hope confidently that you very soon will be able to ship a material of the same high grade as that of the B.C.L.; but during their negotiations the D.B.V. could calculate only with the present less favorable conditions.

After the D.B.V. has come to an understanding with the B.C.L. and the Trona about maintaining uniform prices for refined material, it is naturally not possible to supply crudematerial to outsiders or factories still to be established, without their assuming the responsibility to adhere to the prices agreed upon for the refined material. On such terms we cannot of course get any new customers, as any new factory will only be able to sell her production by under-bidding the prices of the existing refiners. Besides that the B.C.L. would have retaliated by supplying her crude-material to new outside factories in Germany—she has received some inquiries already—and then these factories on their part would have disturbed again our own market of

Exhibit No. 8—(Continued)

refined material. Of course, our as well as your interests would have been injured most seriously thereby. On the other hand, our chances to sell your Kernite to existing refiners, who have been supplied hitherto by the B.C.L. with a much superior crude-material than yours, are very poor. Nearly all parties I have approached during the last year replied that the samples and analyses submitted were so inferior as compared with the Rasorite of the B.C.L. and even the calcined Tincal of the Suckow Mines, that they would not give your material even a trial until you are in a position to ship calcined Kernite testing at least 44% B_2O_3 . Under these circumstances we decided to refrain from making further sales of your Kernite to other European countries—Poland excepted—during 1930 in the hope that by the end of this year you will be able to improve your calcined material up to the standard of your neighbors. Against our renunciation to sell your Kernite outside of Germany the B.C.L. pledged not to sell to Germany boron-crudematerial for the manufacture of Borax or Boric Acid and not to make any sales of boron-crudematerial to the rest of Europe to factories still to be established.

Furthermore, it has been attained that if this year's consumption in Germany will exceed that of the year 1929 the additional quantity up to 15,000 tons, figured on crude-material containing 44% B_2O_3 —including the actual export-deliveries of the

Exhibit No. 8—(Continued)

D.B.V. of refined products and the crude-material—deliveries to the Polish customer—goes fully to the share of the D.B.V. Should the consumption in Germany during this year exceed that figure, the D.B.V. has a share of 50% of the exceeding quantity. This agreement gives the D.B.V. a good chance to sell in Germany considerably more Borax and Boric Acid than during last year.

Furthermore, the B.C.L. and the Trona have pledged not to sell in this year in Germany a larger quantity of Borax and Boric Acid than that delivered to the customers last year. The D.B.V. attained even that the representatives of the Trona consented to deduct a quantity of 500 tons from their quota in favor of the D.B.V. whereas the B.C.L. conceded to the demand of the D.B.V. to increase the export-sales in 1930 by 400 tons above the 1,600 tons delivered in 1929.

The maximum quantities which the B.C.L. and the Trona are allowed to sell in 1930 in German are 8,250 tons Borax and 825 tons Boric Acid.

Right at the beginning of the negotiations it was pointed out that an eventual agreement could only be made for the current year—in conformity with the agreement with the B.C.L. and the Trona. But the B.C.L. let it appear that probably in the fall of this year the negotiations with the Trona about the prolongation of the agreement would be taken up again, so there would be the possibility of a prolongation of the agreement with the D.B.V.

Exhibit No. 8—(Continued)

Regarding the prices for Borax and Boric Acid the B.C.L. and also the Trona agreed to raise the selling-prices in Germany up to the level of the international market. As the lowest price for Borax granulated in 5 ton lots during the last 2 months was RM 22.—per 100 kilos carriage paid, this concession of the B.C.L. means an advance of the German selling-prices by RM 3.—to RM 25.—per 100 kilos. On account of the competition of the Italian firm Larderello the prices for Boric Acid could unfortunately not be raised for the present.

Furthermore, uniform selling-prices for Borax and Boric Acid have been fixed for all European countries and overseas.

I sincerely hope that the foregoing details of our negotiations will show you that we have practically attained our object within reach.

At this opportunity I refer to you your letter of November 26th, 1929 to Mr. Dick, which I have not answered because I wanted to wait for the above mentioned negotiations before doing so. In a discussion of the members of the D.B.V., which took place after the meeting, they have taken notice of your suggestion to extend the contract with you for further 10 years. A resolution was not taken, but in consideration of its great importance the members reserved to examine this matter with all particulars at a later date. The refiners expressed the hope that perhaps in the course of this summer there might

Exhibit No. 8—(Continued)

be an opportunity to meet you personally, either here in Germany or in America, in order to discuss this matter with you thoroughly.

Please note that I am sending a copy of this letter to Mr. Dick.

With kindest personal regards, I beg to remain

Sincerely Yours

/s/ JOHANNES GRASSHOFF.

1 enc.

G/P.

EXHIBIT No. 9

[Western Union Telegram]

San Francisco, November 16, 1932

R. C. Baker

Room 661 Roosevelt Hotel

New York City, N. Y.

Had meeting today with Blumenberg Stauffer and Sherwin Counterproposal submitted by us Friday acceptable save as herein modified for following reasons Devin contract to be one hundred fifty tons borax one hundred fifty tons ore with territory limited to Japan and its possessions Refined borax to be short ton basis thirty seven percent Crude ore long ton basis forty four percent Stop In event Devin unable sell in restricted territory allotted tonnage we to sell differential and credit them with profit on that tonnage within Japan and its possessions Stop Stauffer agrees revise contract to three

Exhibit No. 9—(Continued)

hundred twenty five tons forty four percent per month on which they shall have deduction of three dollars seventy five cents per ton This will refund to Stauffer over contract period of eight and half years approximately one hundred twenty five thousand dollars without interest leaving balance approximately sixty seven thousand dollars of which Stauffer willing to sacrifice one half and of other half one quarter to be paid by Western and the other one quarter to be paid by us in yearly instalments over contract period Stop Stauffer further desires year option to purchase their requirements of boric acid up to twenty five hundred tons per year from us at fifty five dollars per ton in bags carload lots fob Wilmington Stop Should option be exercised Stauffer will discontinue to manufacture of boric acid and ore purchases Stop Guaranteed deduction at rate three dollars seventy five cents per ton on quota of three hundred twenty five tons per month to remain in effect Stop Stauffer states and Blumenberg confirms actual ore purchases of Stauffer during last four years have averaged per year five thousand four hundred forty four tons thirty two percent and have no ore on hand Stop Desire further understanding that sulphuric acid business of Pacific will go to Stauffer at competitive price not only for tonnage used in manufacturing Stauffers requirements of boric acid but for our own requirements as well Stop Westend agrees to counterproposal your wire fifteenth for year nineteen thirty three provided legal agreement to that end can be made stating they have no intention of presently increasing capacity and if

Exhibit No. 9—(Continued)

continuance on that basis thereafter seems desirable for industry would so continue but reserves right to increase production thereafter if no improvement in general conditions Stop Price on excess above eight thousand tons to be agreed upon Stop This wire is dictated in presence of all interested parties and according my understanding is best proposal that can be made.

NEWLIN.

Charge Stauffer Chemical Co.

EXHIBIT No. 10

[Pacific Coast Borax Co. Letterhead]
510 West Sixth St., Los Angeles, Calif.

Private

(No File Copy)

Mr. W. Gauge,
340 Bush St., San Francisco, Calif.

May 10, 1935

Dear Mr. Gauge:

In accordance with our conversation in San Francisco recently I am enclosing herewith translation of a short article which appeared in the Osaka Yakuhi Shimibun issued February 24. This is the article that we feel must have been definitely prompted by some utterances given the press or otherwise by somebody connected with Toa Shoji in Japan. Your comments would be appreciated.

I am also enclosing a further extract from the same paper under date of March 31, giving some figures as to certain tonnages for Japan. If the writer of this article made a guess at the figures, he

certainly guessed along the lines of some of our discussions last year with yourselves.

Possibly there is somebody in the Toa Shoji office in Japan who is giving out some partly incorrect, partly confidential information behind Devin's back, and I hope your people can run the source of these articles down and if they have any control over the source, arrange to exercise such control.

I suggest that it would be as well to destroy this letter after perusal, merely passing on to Japan the articles in question with your own carefully worded comments.

Very truly yours,

PACIFIC COAST BORAX COMPANY,

By /s/ J. M. GERSTLEY

Assistant to Vice President.

JMG-H encs

Extract of Letter from "Osaka Yakuin Shimbun"

24.2.35

BORAX

"Raise the price of borax up to \$100.00 per ton for shipment to Japan" says a leading borax manufacturer of U.S.A. This appears absurd at a sight. But on second thoughts we fear they may do so since U.S.A. suppliers are shipping to Britain at \$90. per ton. Let us review how things have been in the past relative to borax.

It was three or four years ago that "Kernite" was first introduced into the market of Japan through the Toa Shoji. Until that time quotation for market in Japan was agreed upon at \$50. c.i.f. (granular

form). But the market was thrown into confusion by the introduction of "Kernite" in Japan. In fact, the price once declined down to \$29. making a record fall in the past. For this reason there was a brisk buying last year. On the other hands, reshipment was made to Europe from Japan through the Lieberman.

Imports in the past several years were as under:
(per ton of 2,000 lbs.)

| | |
|------|-------------|
| 1934 | 12,267 tons |
| 1933 | 8836 tons |
| 1932 | 9,807 tons |
| 1931 | 7,606 tons |
| 1930 | 3,987 tons |

Although exact amount of export to Europe during last year is unknown, it is estimated at about 2,000/-3,000 tons.

Suppliers in U.S.A. suffered not only from the keen competition among themselves, but also their markets in Europe were damaged by the reshipment on the part of Japanese importers, and in order to check further aggravation of the situation they drew up an agreement among themselves relative to price, etc., at the end of last year. From the beginning of this year they are offering at an advanced price of \$35. per ton c.i.f. (granular form). It is said that they are recently arranging allot-system for export to Japan.

Reason that the price has advanced in the market of Japan since autumn last year is due to the stoppage of shipment to Japan.

Further reason of the high tone of the market is

the report that the freight will be raised by \$2.50 as from the 20th March next.

The price of \$35. ruling since the beginning of last month (January) is still cheap when compared with the price of \$50. prior to the introduction of "Kernite" into the market of Japan.

Even if \$90. for shipment to England is taken as only a rumour, yet the price for market in Japan is still very cheap.

Advance of the price in future is quite therefore possible. Development of market is of considerable interest.

Extract from the "Osaka Yakuhiu Shimbun"

31.3.35

Import of Borax into Japan will be only about
7,000 tons a year.

On account of reshipment of the American borax to Europe and India from Japan, American manufacturers made an agreement among themselves, and they have decided to ship to Japan in less quantity at an advanced price, as previously reported.

According to a telegram received at a certain house, the American manufacturers have allotted 7,000 kilo. tons of borax for Japan as under:

| | |
|----------------|------------|
| C.I.B. | 2,000 tons |
| Kernite | 2,000 tons |
| Three Elephant | 2,000 tons |
| K.B. | 500 tons |
| Smith | 500 tons |

| | |
|-------|------------|
| Total | 7,000 tons |
|-------|------------|

EXHIBIT No. 11

[Letter in longhand:]

Re the attached—Neither Stauffers nor Tronas agents had the desired clause in contract—that is why we were blocked. Our arrangements with our agents are such that we can change their prices overnight so your people's dope is all wet. Also all B.M.s present contracts provide that all further freight increases are for buyers accounts. This is true of Trona's & Stauffer's agents too—now!

I'm returning these letters to you as I don't want them on our files. I think and so does PMT that our letters to each other should not refer to agreements—gentlemen's or otherwise—other than Western United, unless in notes like this and suggest you "lose" your file copies of the attached letter.

I've just received your longhand letter of July 7th. I've no idea about Takeda or Konishi—all I know is what we get from London—we here have no direct dealings with B.M.—so I'll have to wait and see what London says.

You can rest assured that anyone insinuating our company is trying to get duties increased in Japan is talking through his hat—obviously we're interested in no duties in Japan. If you can't see that I'll be glad to explain when I see you—but I think you'll see the point.

My official letter today was not written with one eye on records and the other on your people in Japan so don't take anything I said amiss. I couldn't leave your letter on file without a reply, however.

Best regards [illegible]

July 7, 1937

Dear Mr. Gerstley:

This note and also our letters of the 2nd are not sent with any idea of "twisting the lions tail"—quite the contrary they are sent because we think present methods of selling Takeda and Konishi, the latter 600 tons, will defeat much of the good work we have done in cooperating with the various interests the past year on shipments of refined borax to Japan, also their relation to exports.

It should be obvious to you that when we advised Takeda & Konishi they and we could not secure additional tonnage because you feared exports—then shortly thereafter have your agents walk in and sell both, does your goodselves more harm than we, whether or not tonnage was sold for the manufacture of boric acid or otherwise.

We have if you will remember on no occasion approached your customers or in any other manner discredited P.C.B. Co., we felt all this in keeping with the spirit and letter of the contract which refers to competition.

In the past when you would not give us refined borax we asked for Boric Acid. Your replies to both are well known to you.

If your recent move working through Konishi & Co. and Toyama Koyaku for the manufacture of additional boric acid in Japan is a move to have duties increased in Japan, please keep in mind that Mitsui, Mitsubishi and Takeda will gain much as you will—in addition thereto exports will not be stopped.

As these and other matters do not fit in with our conversations on subjects we thought you might clear them up and let us know what it is all about. If any are confidential, state so, and your wishes will be respected.

Best regards.

W. G.

Addendum No. 49

EXHIBIT No. 12

[Pacific Coast Borax Co. Letterhead]
51 Madison Avenue, New York

Mr. Victor C. Emden,
Essex House, 325 East 41st Street,
New York, N. Y.

May 25th, 1935

Dear Mr. Emden:

I enclose check in your favor for \$5,000.00 being the second and final payment of your fee for services rendered, as outlined in the recent agreement. Will you kindly receipt and return the enclosed voucher and oblige.

I understood from our phone conversation that you were leaving New York next week, presumably for return to the Coast and hope that you will have an enjoyable trip West.

Yours very truly,

PACIFIC COAST BORAX COMPANY,

/s/ F. T. WINTERS.

FTW:K.

EXHIBIT No. 13

RECEIPT AND RELEASE

In consideration of the payment to the undersigned of the sum of Ten Thousand Dollars (\$10,000.00) by Pacific Coast Borax Company (\$5,000.00 of which has been paid upon delivery of this instrument and the remaining \$5,000.00 of which is to be paid within thirty days from date hereof), I hereby acknowledge the said sum of \$10,000.00, when fully paid, to be in compromise and full payment of all claims on account of services and disbursements rendered or made or claimed to have been rendered or made on behalf of said Pacific Coast Borax Company, Borax Consolidated, Limited, or any affiliated company in connection with a proposed purchase from Suckow Borax Mines Consolidated, Inc., or from John K. Suckow of half interest in the West Half ($W\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section Fourteen (14), Township Eleven (11) North, Range Eight (8) West, S.B.M., in the County of Kern, State of California; and likewise in compromise and full payment of all claims, known or unknown, on any account whatsoever which I may have or claim to have against said Pacific Coast Borax Company, Borax Consolidated, Limited, or any affiliated company with respect to any transaction or transactions concerning said property or any other property or any other transaction whatsoever, it being the purpose and intention of this document to fully and completely release and discharge each and all of the said companies of and from any and

all liability or obligation to the undersigned on any account whatsoever.

In Witness Whereof, I have hereunto set my hand this 10th day of May, 1935.

/s/ VICTOR C. EMDEN.

State of New York,
County of New York—ss.

On this 10th day of May, 1935, before me, Isaac L. Goldstein, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Victor C. Emden, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

(Seal) /s/ ISAAC L. GOLDSTEIN,
Notary Public in and for said County and State,
New York.

My Commission expires March 30, 1937.

EXHIBIT No. 14

[Postal Telegraph]

August 1, 1930

Henry Blumenberg
640 South Arden Blvd., Los Angeles, Calif.

Strongly recommend that you show McClintock your mine and other facilities on Saturday if possible in order to dispel any wrong impressions that

Sucow may have about same Stop This will give McClintock chance to set Suckow right before his meeting with Jenifer on Monday.

JOHN STAUFFER.

EXHIBIT No. 15

8-19-30

Telegram from Blumenberg to Stauffer

“Had long interview with McClintock told him S must be eliminated suggested he buys S out PCB furnishing the money making him president of company and that I would then go into any fair and just business arrangements Jenifer approves of this if it can be put through told him furthermore it was impossible to go over two hundred thousand This will divide the S camp probably in two factions and is really the only way peace can be obtained Am in constant touch with Jenifer several times each day and hope only for the best answer my home.”

(Copy)

EXHIBIT No. 16

[Johannes Grakhoff Letterhead]

[Stamp]: Received Sept. 25, 1930. Western Borax Co.

Hamburg, September 12th, 1930

Western Borax Company, Ltd.,
566 Subway Terminal Bldg.,
Los Angeles, California.

No. 276

Gentlemen:

Reverting to your favors of the 7th, 10th and 22nd July with regard to resale of crude material in Europe, I wish to inform you that on August 12th a conference was held in London between a committee of the Deutsche Borax Vereinigung and the representatives of Borax Consolidated Limited and Messrs. C. Christopherson & Co., London, with the object of fixing the conditions for a prolongation of the existing agreement for the next year. The main subject of this conference was the discussion on the resale of 3000 tons crude material in Europe through the D.B.V. Whereas in your aforementioned letters you always speak of 5000 tons, I beg before all to remind you that this figure represents the maximum quantity, the minimum being only 3000 tons. At the London Conference the General Manager of B.C.L., Mr. R. C. Baker, positively declined to negotiate with us about the resale of crude material for the reason that the D.B.V. represents refining interests only and has no right to sell crude material in Eu-

Exhibit No. 16—(Continued)

rope. When pointing out to Mr. R. C. Baker that the D.B.V. had pledged to your company to draw a minimum of 3000 tons for resale and that you do not intend to give up this part of the contract, Mr. Baker replied that you would have to surrender the resale contract without any compensation and that he had no doubt of coming to an understanding with you quickly. Then the representatives of the D.B.V. made the alternative suggestion that we should be allowed to sell during 1931 to Poland and Russia the same quantity of crude material which we have sold during the year 1929, viz. 1000 tons. But also this suggestion has been declined by Mr. R. C. Baker in one of the recent letters of B.C.L.

Mr. R. C. Baker will sail for the U.S.A. at the end of September and intends to confer with your good-selves as well as with Mr. Stauffer and Dr. Suckow about the various existing difficulties. For your guidance in the negotiations with Mr. Baker or Mr. Zabriskie I beg to hand you enclosed the German copy as well as an English translation of the statement of the conditions fixed by the D.B.V. for an agreement for 1931, which have been submitted to B.C.L. by Messrs. Schering-Kahlbaum A. G., Berlin, on the 8th inst. and which contain the utmost concessions the members are prepared to make for a prolongation of the present agreement.

In perusing these conditions you will perhaps be surprised to learn that we have consented to the reduction of the resale agreement and in this connec-

Exhibit No. 16—(Continued)

tion I wish to point out to you that the position of the D.B.V. is extremely difficult as in fact the interests of the D.B.V. have been restricted in former years to the refining business exclusively, so that we could only refer to our obligation to you to draw a quantity of at least 3000 tons for resale. Furthermore, the members of the D.B.V. are inclined rather to meet the wishes of B.C.L. in the crude material question than to take the risk of a new slump in the prices for the refined products. However, I hope that you will be more successful than we were in London by inducing Mr. R. C. Baker to change his mind with regard to the resale contract and to admit the resale of the quantity of crude material as specified in your contract with the D.B.V.

Kindly advise Mr. Dick or me by cable of the results of your negotiations. Meanwhile I am with kindest personal regards

Sincerely yours

/s/ JOHANNES GRASSHOFF.

2 encl. P.

P.S.—I wish to call your special attention to the fact that the aforementioned statement of conditions for an agreement for the year 1931 has been sent to B.C.L. with the particular proviso of your agreement to these conditions.

(Second Mail Copy)

[Stamp]: Received Sept. 26, 1930. Western Borax Co.

Exhibit No. 16—(Continued)

Statement of the Conditions for Agreement
for the year 1931

1. The deliveries of refined material made by Borax Consolidated Limited (hereinafter referred to as B.C.L.) and the firms directly under their control to Germany for the year 1931 shall not exceed 1750 tons of Borax, 325 tons of Boric Acid apart from their participation in any increased consumption in Germany beyond the balance of sales allotted to the Deutsche Borax Vereinigung (hereinafter referred to as the D.B.V.) under Paragraph 6. Such undertaking must not be interpreted to affect any deliveries of refined material made by B.C.L. to the Deutsche Gold-und Silber-Scheideanstalt and/or Schott & Genossen.

2. The deliveries of refined material made by the other non-German party to Germany shall not exceed the figures of 6500 tons of Borax, 500 tons of Borax Acid with the proviso of the clauses of Paragraph 6.

3. The quantity of refined material, which the D.B.V. is allowed to export, shall not exceed the equivalent of a maximum of 2000 tons of crude material basis 44 per cent converted into Borax and/or Boric Acid.

4. The D.B.V. is entitled to supply the Aktiengesellschaft der Chemischen Werke (Dr. Sachs), Warschau, during the year 1931 with a quantity not exceeding 1000 tons of crude material basis 44% on the basis of the agreement made for the year 1930.

Exhibit No. 16—(Continued)

In case the deliveries to the Aktiengesellschaft der Chemischen Werke should amount to less than 1000 tons, the D.B.V. is entitled to sell the quantity wanting to the Russische Handelsvertretung either direct or through B.C.L. at the prices and terms mutually agreed with B.C.L.

5. Apart from the right to sell crude material as per Paragraph 4 and eventual deliveries of crude material in case of any new uses developing in Germany according to Paragraph 7, the D.B.V. undertake not to make any sales or deliveries of crude material.

6. The D.B.V. is entitled to sell the equivalent of up to 15,000 tons of crude material basis 44 per cent in the form of refined material for home trade and export, such total quantity including that required to fill the contract referred to in Paragraph 4.

Example:

| | Tons |
|--|--------|
| Estimated quantity of crude material 44% exported by the D.B.V. corresponding to | 2,000 |
| Estimated Kernite deliveries to Dr. Sachs and Russians corresponding to crude material 44% | 1,000 |
| Thus leaving for the D.B.V. inland sales equivalent of crude material 44% | 12,000 |
| | 15,000 |

In the event of the demand in Germany increasing to such extent that after taking into account the deliveries made by the D.B.V. in Germany and for export and their deliveries of crude material to Dr. Sachs and to the Russians the sales of the D.B.V. exceed in all the quantity of 15,000 tons, then B.C.L.

Exhibit No. 16—(Continued)

and the other party on the one part shall participate to the extent of fifty per cent and the D.B.V. on the other part shall participate to the extent of fifty per cent in such increase beyond 15,000 tons.

B.C.L. and the other party concede to the D.B.V. at least 60 per cent of the consumption of refined material in Germany.

The demand for a Minimum Quota of 60 per cent is based on the following calculation:

| | Crude material 44% |
|---|-----------------------|
| Maximum Quota of B.C.L.: | |
| 1750 tons Borax x 0,833=1458 tons crude material 44% equivalent) | |
| 325 tons Boric Acide x 1,283= 417 tons crude material 44% (equivalent) | = 1875 tons |
| Maximum Quota of the other party in 1930: | |
| 6500 tons Borax x 0,833=5415 tons crude material 44% (equivalent) | |
| 500 tons Borix Acid x 1,283=641 tons crude material 44% (equivalent) | = 6056 tons |
| Quota of the D.B.V. during 1930 for home trade: | =12000 tons |
| <hr/> | |
| Total Quantity in Germany about: | 20000 tons |

The quota of at least 60 per cent of the refined material trade allotted to the D.B.V. has been derived from the aforementioned figures. This means that in the event of the demand in Germany decreasing below 20,000 tons the maximum quota allotted to B.C.L. and the other party has to be reduced correspondingly.

7. B.C.L. is entitled to sell crude material to Germany to Deutsche Gold- und Silberscheideanstalt, Henkel & Co., Schott & Genossen, Glaswerke

Exhibit No. 16—(Continued)

Ruhr, Glaswerke Brockwitz, provided those deliveries are strictly confined to material intended for buyers' own consumption and not for resale as Borax and/or Boric Acid.

Apart from the above right to sell B.C.L. undertakes not to make any sale of crude material to Germany.

Should the requirements of the Glaswerke Ruhr and the Glaswerke Brockwitz exceed the quantity drawn during 1929, totaling 357 tons of 44 per cent crude material, the quantity in excess of aforementioned 357 tons shall be considered in reduction of the maximum quantities of refined material specified in Paragraph 1.

In the event of any new uses for crude material developing in Germany during the currency of this Agreement then before any sale is effected the parties to such Agreement shall meet together and discuss the terms and conditions of sale and if no mutual understanding is arrived at in regard to such sales then each party shall be entitled to terminate this Agreement at thirty days' notice. Notwithstanding, small quantities of crude material may be supplied for making experiments.

8. B.C.L. undertake not to deliver crude material to any new factories that may be started in other countries in Europe to manufacture Borax and/or Boric Acid during the period of this Agreement.

9. The firms participating in this agreement as also all those companies controlled by them under-

Exhibit No. 16—(Continued)

take to adhere to the selling prices and conditions for refined material fixed by them.

10. The prices and conditions for refined material for Germany shall in principle conform to the world's market prices; a request of the D.B.V. to alter the selling prices and/or terms in Germany shall not be rejected by the other parties without convincing motives.

11. In the event of any alteration in the prices of refined material in countries bordering on the German frontier whenever such alteration in prices plus the duty levied in Germany would bring such prices below the figures ruling in Germany the D.B.V. shall be consulted before such change is decided upon and their agreement obtained which shall not be unreasonably withheld.

12. For the rest of the world selling prices and conditions shall be fixed by B.C.L.

13. All alterations in prices must be notified by B.C.L. to Mr. Johannes Grasshoff, Hamburg, by telegram twenty-four hours before such come into effect. Mr. Johannes Grasshoff is bound immediately on receipt of said telegram to communicate the new prices likewise by telegram to all the members of the D.B.V.

14. In the event of any firm desiring to carry through any business in exceptional instances at special prices below the agreed selling conditions then the previous consent of all the contracting parties must first be obtained.

15. In the event of any new serious competition

Exhibit No. 16—(Continued)

arising in Germany then a way shall be mutually sought without delay which offers prospects to fight such new competition involving the smallest sacrifice whilst securing the most effective results.

In the event during the currency of this Agreement of the German market being disturbed seriously by the existing or any new outsiders then the contracting parties are pledged upon receipt of notice from another party to take proper measures against the competition. In the event of this demand not or not sufficiently being complied with then each party is entitled to terminate this Agreement at any time irrespective of the date of expiration at a fortnight's notice, counting from the date of such notice.

18. B.C.L. undertake not to adopt measures to fight the outsiders outside Germany which would lead to such outside material being forced on to the German market.

17. This Agreement covers up to the thirty-first day of December One thousand nine hundred and thirty-one.

Alternative Suggestion to Paragraph 4

In the event of the stipulations fixed in Paragraph 4 not being approved, the D.B.V. is ready to renounce the claim of selling the quantity of crude material up to 1000 tons not drawn by Dr. Sachs, Warsaw, to Russia, provided the other contracting parties are willing to reduce their quotas in the refined material trade by 1500 tons Borax in all.

In such case the minimum quota of the D.B.V. of 60 per cent of the German consumption specified in Paragraph 6 is to be increased by 1500 tons Borax corresponding to 1250 tons crude material 44 per cent to at least 13,250 tons crude material 44 per cent equal to a quota of $66\frac{1}{3}$ per cent, and the maximum collective total quantities of B.C.L. and the other party are to be reduced correspondingly.

P.

EXHIBIT No. 17

[Johannes Grasshoff Letterhead]

[Stamp]: Received Jan. 19, 1931, Western Borax Co.

Hamburg, January 6th, 1931

Western Borax Company, Ltd.,
566 Subway Terminal Bldg.,
Los Angeles, California.

No. 336

Gentlemen:

I want to confirm your two favors Nos. 52 and 56 with reference to the agreement for the current year, and wish to thank you for the report about your conference with Messrs. Baker and Zabriskie in San Francisco. However, you state in this letter that Mr. Baker last year agreed to the resale of crude ore in Germany through the German Refiners, which is not the case according to my records as Mr. Baker has at all times strongly objected to the resale of ore through the Germans. For the negotiations with the English which were to take place in Europe,

after you agreed with Mr. Baker to let matters rest, I cabled Mr. Dick to communicate with you, and to ask for your approval to release the Refiners from the obligation to take any resale quantities during the new agreement with the English. Mr. Dick informed me that you waived the resale clause for 1931 provided that Mr. Baker would agree to the conditions of my letter No. 276, but it must be understood that this waiver does not affect the contract as a whole.

At the meeting which took place on December 17th and 18th, 1930, in Berlin Mr. Gerstley of Borax Consolidated Limited reported about the negotiations of Mr. Baker in America, which have, as far as the Pacific Alkali Company is concerned, not shown any positive results so far, as Mr. Mudd who owns this company is visiting Europe and Egypt. After his return to America the negotiations will be taken up again. Furthermore, it was stated that the Suckow Borax Mines had difficulties with "Gembo", the outsider in Holland, about analysis-differences which amount to about 3%, and there is a possibility that "Gembo" herself will take over the mining of the ore of the Suckow-Mine. Mr. Baker has suggested to Dr. Suckow to close his mine in which case B.C.L. would fulfill the contracts signed by Dr. Suchow. However, there will be hardly a chance that an agreement can be come to before the end of March, although a gentleman has been entrusted with the continuation of the negotiations.

Considering this it was suggested that a pro-

visional agreement should be made to expire on April 30th, 1931. The total of the sales in Germany shall be divided among the three parties of the agreement as follows:

| | |
|----------------------------|-----|
| Deutsche Borax-Vereinigung | 56% |
| C. Christopherson & Co. | 35% |
| Borax Consolidated Limited | 9% |

As already advised by my cable of December 19th, 1930, the quota of 56% allotted to the D.B.V. means a small increase over that of last year. The export-quota of refined material of the D.B.V. remains unchanged, and it has been attained to obtain a prolongation of the crude-material contract with our Polish friends. The latter have already informed me that their requirements for the current year amounted to about 50 tons Kernite monthly. On the other hand we pledged to refrain from further resales of crude ore. Considering the heavy competition of the outsiders and the prevailing market situation the above agreement must be called favorable.

On the 19th (Dec. 1930) of last month I cabled you the results of the agreement as follows:

“Made provisional agreement with English and Trona till April thirtieth our share of total German trade fifty-six percent means small increase over 1930 Stop Export quota and Poland contract unchanged but waived further resales Stop Shall give final agreement unless receiving your objection till Monday think agreement favorable considering outsider competition and market situation Stop English

expect settling Suckow and Alkali matter till April.”

Your reply of the 19th December reads as follows:

“Cable received your arrangements with Trona and BCL agreeable.”

I beg to thank you for your consent and your assistance in this matter, and informed the Refiners accordingly.

With kindest personal regards, I am,

Sincerely yours,

/s/ JOHANNES GRASSHOFF.

[Title of District Court and Cause.]

AFFIDAVIT OF FRANK BUREN IN OPPOSITION TO MOTIONS TO DISMISS.

United States of America,
Southern District of California,
County of Los Angeles,—ss.

Frank Buren, being first duly sworn, deposes and says:

That he is the Frank Buren referred to on pages 35, 37 and 38 of the brief on behalf of Defendants Borax Consolidated, Ltd., and others and filed herein in support of the said motions to dismiss;

That between the years 1932 and 1940, affiant was at various times Secretary of said Suckow Borax Mines Consolidated, Inc., one of the plaintiffs herein, and at various times during said period acted as attorney for said Suckow Company;

That at the time affiant made the statements or allegations referred to in said brief, he had no

knowledge or information of any kind whatsoever of the existence of the 1929 conspiracy denominated in the complaint as "General Conspiracy," and that none of the statements made by him and referred to in said brief had reference to said '29 conspiracy. That all of said statements referred to the particular activities of Defendant Borax Consolidated, Ltd., and its subordinates and affiliates and involved in said suit referred to and numbered C-107M and the other suits and litigation in which said Defendant Borax Consolidated, Ltd., had involved Dr. Suckow or the said Suckow Company, and all of such statements of affiant as to monopoly or conspiracy referred solely and only to said conspiracies involving said suits or actions. Likewise the reference made by affiant in the hearings before the United States Senate Committee, and referred to on pages 37 and 38 of said brief of Defendant Borax Consolidated, Ltd., had reference only to the proceedings and activities of defendants and involved in said action No. C-107-M and the said other suits in which said Borax Consolidated, Ltd., had involved Dr. Suckow or the Suckow Company, and the testimony given by affiant at such hearings, referred to on page 37 of said brief, pertained to the various and sundry suits which were or had been prosecuted against Dr. Suckow or said Suckow Company by said Defendant Borax Consolidated, Ltd., or its affiliates or associates;

That at no time during said period within which affiant was connected with said Suckow Company did Dr. John Suckow ever mention or refer to the

said General Conspiracy of 1929, and affiant is certain that Dr. Suckow had no knowledge of the existence of said '29 conspiracy; that said Dr. Suckow at various times discussed with affiant the possibility and probability of a monopoly existing in the borax industry and maintained by Defendant Borax Consolidated, Ltd., and its associates, but affiant knows of his own knowledge from statements made to him by said Dr. Suckow that the latter had no proof of the existence of such monopoly or conspiracy as charged and his thoughts in connection therewith were mere suspicions.

/s/ FRANK BUREN.

Subscribed and sworn to before me this 2nd day of April, 1948.

(Seal)

/s/ E. FARRAR,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires August 21, 1951.

[Endorsed]: Filed April 7, 1948.

DEFENDANT'S EXHIBIT "A"

In the District Court of the United States for
the Northern District of California,
Southern Division

No. 27646-R

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation; MOJAVE BORAX COM-
PANY, LTD., a corporation; PAUL O. TOBE-
LER, Executor of the Last Will and Testament
of JOHN K. SUCKOW, Deceased, and RUTH
E. SUCKOW,

Plaintiffs,

vs.

BORAX CONSOLIDATED, LTD., a corporation,
et al.,

Defendants.

AFFIDAVIT OF C. N. OLSON

State of California,
County of Los Angeles—ss.

C. N. Olson, being first duly sworn, deposes and
says:

That he was at all times hereinafter mentioned
an official shorthand reporter for the Honorable
Earl E. Moss, Referee in Bankruptcy, in the Dis-
trict Court of the United States for the Southern
District of California, Central Division.

That he was the official reporter at the hearing
held on February 6, 27 and 28, 1934; March 1, 3, 14,
21, 23 and 28, 1934; and April 4 and 16, 1934, be-
fore said Honorable Earl E. Moss, Referee in

Defendant's Exhibit "A"—(Continued)

Bankruptcy, in the Matter of Suckow Borax Mines Consolidated, Inc., a corporation, Bankrupt, bearing No. 16938-H on the records of said court; that said hearing was held on the petition of said Suckow Borax Mines Consolidated, Inc., a corporation, for an order to show cause why the Trustee in Bankruptcy should not execute and deliver a lease of the entire alleged bankrupt estate; that the said Suckow Borax Mines Consolidated, Inc., the alleged bankrupt, was represented at said hearing by its attorneys, William H. Neblett, Esq., E. H. Mitchell, Esq. and Arnold A. Odum, Esq., of the firm of McAdoo & Neblett, and Frank Buren, Esq.; that Pacific Coast Borax Company, a corporation, and Borax Consolidated, Ltd., a corporation, were represented at said hearing by their attorney, A. W. Ashburn, Esq., of the firm of Newlin & Ashburn; that Hubert F. Laugharn, Esq., Trustee in Bankruptcy in said proceeding, was represented at said hearing by his attorney, Walter H. Moses, Esq.

That the following is a full, true and correct transcript of certain statements made and proceedings had at said hearing:

"Mr. Neblett: There is no evidence on that score, and besides I say counsel,—I will say the Borax Consolidated has made a violent attempt to put Doctor Suckow out of business and now they present the remarkable spectacle of trying to put him entirely out of the Court's mind." (Tr. page 11, lines 21-25.)

"The Referee: If I read the pleadings correctly, there are some conclusions in the pleadings

Defendant's Exhibit "A"—(Continued)

which are disputed and there are some facts plead like the question of monopoly that of course is entirely immaterial.

"Mr. Neblett: We concede that, your Honor. That got into the position——

"The Referee: But the material allegations of fact are almost undenied, isn't that correct? You raise a great many matters as affirmative defense.

"Mr. Ashburn: Yes, we did do this, though, it occurs to me offhand, we denied for lack of information the making of the Small offer or the bona fides of the offer. We raised the issue as to who this fellow Small is and what his financial ability is and who are his associates. Now, the remark just made by Mr. Neblett leads me to inquire this because it looks as if it was intended to somewhat simplify the issues. Do I correctly infer from that that you concede that the allegations of paragraph 11 of the petition are immaterial?

"Mr. Neblett: I will have to look at paragraph 11.

"Mr. Ashburn: Yes.

"The Referee: It would seem to me that except the allegation that the bankrupt is a cotenant of the Borax Consolidated which is alleged in another place, the allegation of the filing of the suit and the filing of the bankruptcy petition, that all the rest of the allegations of that paragraph are immaterial.

"Mr. Moses: There is also an allegation as to the price of ore, which may or may not be material.

"The Referee: I doubt its materiality.

Defendant's Exhibit "A"—(Continued)

"Mr. Neblett: I have no objection—I mean I take no exception to the Court's statement or ruling. I will answer the question of Mr. Ashburn in that manner.

"Mr. Ashburn: All right. I do not want to be misunderstood. I am not here to block a canvass of these issues. They have been bandied around this town for months and months, and if the bankrupt has evidence to prove them as far as I am concerned, he can go ahead and prove them, but if they concede these allegations are immaterial before this proceeding starts, then I am ready to submit to this Court and trustee an offer on behalf of my client which is far more advantageous to this bankrupt estate than anything before this Court now but I am not going to do so while we are faced with these charges.

"Mr. Neblett: I am not saying those things are not true—I do not want to be misunderstood either. I claim they are true and I claim those allegations will be proved in the proper proceedings at the proper time, but they are not material in accordance with your Honor's ruling in the present proceeding. That is as far as I can go. I take no exception to your Honor's ruling because it is limited as I understand it and your Honor is not extending it beyond the present pending proceedings.

"The Referee: Correct.

"Mr. Ashburn: Does your Honor understand Mr. Neblett's statement to be a concession these allegations are not material to this proceeding?

"The Referee: As I understand he takes no ex-

Defendant's Exhibit "A"—(Continued)

ception to the Court's ruling they are immaterial, without the right to appeal or review.

"Mr. Ashburn: I understood him to stipulate they were immaterial.

"Mr. Neblett: If you understood that I withdraw it and stand upon the proposition as stated by the Court.

"Mr. Ashburn: All right.

"Mr. Moses: It seems to me they are either material or immaterial, but that is strictly a matter of law. I do not see why this estate should be subjected any more than is necessary to clamorings of one kind or another on the part of its bankrupt or officers, attorneys, representatives or employees or what have yous for the benefit of the public press and anybody else who is silly enough to pay attention to a lot of unverified statements.

"The Referee: If you can find someone to stop these things——

"Mr. Moses: I think the time has come in this proceeding to ignore conversation as far as court proceedings are concerned. Everybody has his remedy I am sure for every wrong that has been perpetrated against him. That is a theory of our law and I believe is true in practice. Whether it results that way or not is sometimes a matter of opinion, but I do not see why this estate cannot be administered like an estate in bankruptcy and not a theatrical proposition for the benefit of every Tom, Dick and Harry that reads the newspapers, and I feel personally that the allegations of this particular

Defendant's Exhibit "A"—(Continued)

petition which are wholly immaterial as to whether or not the trustee should have an operation of this property could only have had one purpose in being put in this petition and that was the publicity which followed the filing of this petition, and I am referring to the articles that appeared in the newspapers on the Sunday after the Saturday the petition was filed, and the matter would have been wholly uninteresting to the newspapers without the allegations of paragraph 11." (Tr. page 32, line 25, to page 36, line 15.)

"Mr. Neblett: Do I understand you are referring to monopoly now, is that your idea?

"Mr. Moses: I have made the statement and I think it is perfectly clear to anybody who wants to understand it.

"Mr. Neblett: I think it is perfectly clear and it means you are defending it.

"Mr. Moses: You are at perfect liberty to put any construction on it you want.

"Mr. Neblett: That is my construction.

"Mr. Moses: And I feel as attorney for the trustee in this estate it is not asking any more than the estate is entitled to to have the attorney for the bankrupt state, as he has admitted, these matters are not germane to the inquiry here today and therefore we can proceed to determine whether or not this property may or may not be operated in some manner which will net a return to this estate.

"Mr. Neblett: I thought that the Court had ruled upon it and I thought I had stated I would

Defendant's Exhibit "A"—(Continued)

take no exception to the Court's ruling, and if I am mistaken in that I will restate it, and I expressly state I think the allegations are true and feel they can be proved at the proper time." (Tr. page 37, line 9 to page 38, line 4.)

"Mr. Neblett: May I make a remark to the Court at this moment?

"The Referee: Yes.

"Mr. Neblett: This remark is provoked by a statement that counsel for Borax Consolidated made just prior to the adjournment. That remark was that Borax Consolidated, Ltd., or Pacific Coast Borax Company or themselves jointly would have an offer to make to this Court. When that offer is made, if it is made, your Honor, I shall ask the Court to be relieved from the lack of objection to the ruling of the Court on the immateriality of some of the allegations in paragraph 11 of the petition. My reason for that is this, in the event such an offer is made, and I am informed by my associate who drew this petition, and what I am going to say now is what he told me,—that the purpose of including that in the petition in the first place, that is it was understood tacitly that maybe some such offer might come in and if any such offer is made by Mr. Ashburn's client then I shall ask to be relieved for the reason we think and feel we can prove that that offer will be an attempt to obtain a lease in the names of those parties or in some person representing them for the purpose of continuing the strangulation of this business of the

Defendant's Exhibit "A"—(Continued)

Suckow Borax Mines now in the hands of the trustee and for that reason I shall ask the Court when the offer comes in to be relieved of it." (Tr. page 40, line 6 to page 41, line 5.)

"Mr. Neblett: Your Honor please, now wait a minute. I object on the ground the Pacific Coast Borax Company and Borax Consolidated, Ltd., are now trying to prove by this witness he is a member of their monopoly and thereby making the whole thing void if ever granted. If this witness should agree to fix prices with the Pacific Coast Borax Company on the witness stand or any way else, it would furnish a basis not only to declare the lease void but furnish a basis for criminal action against all of them. That is the theory of the thing, and it is perfectly apparent. It may be the Pacific Coast Borax Company and Borax Consolidated have so long enjoyed a monopoly they have forgotten the laws that are against them. That is the position I take on the thing.

"The Referee: Let me ask the witness a question.

"Q. I take it, and it is practically self-evident, if you accepted a lease containing terms approved by the Court you would comply with those terms?

A. Yes.

"The Referee: Now then, when you get to the point of preparing and presenting the lease I will be very glad if that point is reached, I will be very glad, Mr. Ashburn, to see any proposed draft you may care to offer as to the terms of the proposed lease and then when those terms have been agreed

Defendant's Exhibit "A"—(Continued)

upon you may ask this or any other party to the lease any questions that you desire concerning those terms.

"Mr. Ashburn: I take it that is a ruling on the objection?

"The Referee: It is.

"Mr. Ashburn: We except. Now I want to say in response to the voluntary statement of counsel that I have invited him before and I invite him again to substitute for his unsustained charges of monopoly evidence of the charges if he has evidence, and let him prove it and produce something other than mere uncorroperated statements.

"Mr. Neblett: I can prove it as a defense of Borax Consolidated against the Suckow Borax Mines, if that ever comes to trial, if you can ever beat Mr. Moses down and get it to trial I can prove it beyond any doubt." (Tr. page 142, line 22 to page 144, line 8.)

"Mr. Neblett: If the Court please, we have gone over the offer made by the Pacific Coast Borax Company and we will say in the main that we will not resist the offer and will upon certain minor considerations accept it—or qualifications, I should say—but I would like to ask Mr. Jenifer a few questions because I have been so surprised with this offer of \$5.00 a ton that maybe that is not all the ore is worth, and if the property is worth any more than that I think the trustee should get the benefit of it.

Defendant's Exhibit "A"—(Continued)

"Mr. Ashburn: We object to any examination on that ground. It might be worth \$40 a ton and we would not have to offer forty." (Tr. page 168, lines 7 to 18.)

"Mr. Neblett: In order to make myself clear I will present what I propose to prove and your Honor has already indicated the Court's ruling and the Court will then make its ruling on the matter.

"I offer to prove by this witness that the ore is worth less than \$5.00 a ton in the ground and that the offer is made not for the purpose of operating the mine so as to obtain moneys to run the properties and keep the properties in condition but for the purpose of controlling the production of borax in that field. That the offer itself, while uncertain in some particulars, I assume those uncertainties may be cleared up in the Court's order, and in the acceptance which I will state to your Honor made by the petitioner, the condition of the offer is it must be accepted by the petitioner and that is a reasonable condition of course because of the pendency of the bankruptcy proceedings at this time which, if it were reversed and the bankrupt did not consent might cause complications as far as the lessee is concerned, and I think the petitioner's consent is vital on that account. I will make the offer along the line suggested, that is that we offer to prove by this witness that that lease proposed by the Pacific Coast Borax Company is made not for the purpose of assisting the trustee and not for the

Defendant's Exhibit "A"—(Continued)

purpose of obtaining money for the estate but for the purpose of controlling the production of borax in Kramer Field in Kern County by the proposed lessee, its subsidiaries and owners. That is the limit of my offer." (Tr. page 172, line 6 to page 173, line 8.)

"Mr. Buren: As to the question of objection, the document I filed this morning shows the reason we are objecting to the lease of the Pacific Coast Borax Company. If it were someone else other than them we might not object to it. We do not believe, and I have no hesitancy in so stating, we do not believe they are acting in good faith in making this offer, but it is made merely for the purpose of keeping someone else out of the market." (Tr. page 258, line 25 to page 259, line 6.)

That said statements were made in the presence of affiant and taken down by him in shorthand and were thereafter transcribed and reduced to typewriting under his supervision and direction.

/s/ C. N. OLSON.

Subscribed and sworn to before me this 29th day of March, 1948.

(Seal) /s/ W. J. MILOTZ,

Notary Public in and for said
County and State.

Defendant's Exhibit "A"—(Continued)

In the District Court of the United States,
Southern District of California,
Central Division

Before the Honorable Earl E. Moss, Referee in
Bankruptcy.

No. 16938-H

In the Matter of SUCKOW BORAX MINES
CONSOLIDATED, INC., a corporation,
Bankrupt.

A Petition for Order to Show Cause Why the
Trustee in Bankruptcy Should Not Execute and
Deliver a Lease of the Entire Alleged Bank-
rupt Estate.

Comes now Suckow Borax Mines Consolidated,
Inc., a corporation, and petitions this court that
an order directed to Hubert F. Laugharn, trustee
of the above entitled bankrupt estate, be issued by
this court to show cause why he should not execute
and deliver a lease of the entire estate of the al-
leged bankrupt, and, as grounds for such order,
represents to the court as follows:

* * * *

X.

That Borax Consolidated, Ltd., a corporation or-
ganized and existing under and by virtue of the
laws of the Kingdom of Great Britain and quali-
fied to do business in the State of California, was
and is co-tenant with your petitioner in the owner-
ship of the real property hereinabove particularly
described.

Defendant's Exhibit "A"—(Continued)

XI.

That your petitioner is informed and believes, and on such information and belief alleges, that Borax Consolidated, Ltd., maintains and controls a world-wide monopoly in the mining, refining, distribution and sale of borax, a household article of general use;

That the total requirements of the world market for refined borax is 200,000 tons a year;

That the product so mined and sold in the enjoyment of its great monopoly by Borax Consolidated, Ltd., the English corporation, all comes from the Kramer district in Kern County, California;

That Suckow Borax Mines Consolidated, Inc., the alleged bankrupt, is a co-tenant with Borax Consolidated, Ltd., on 240 acres in Kern County containing the rich deposit of borax ore;

That Suckow Borax Mines Consolidated, Inc., was mining this co-tenancy property and refining the product, thus offering the only competition in world trade in refined borax after Borax Consolidated, Ltd., had gradually acquired the properties of all competitors;

That in 1930 a suit was commenced entitled "Borax Consolidated, Ltd., a corporation, v. Suckow Borax Mines Consolidated, Inc., John K. Suckow, et al." the purpose of which was to establish a lien upon the Suckow Borax Mines Consolidated's undivided one-half of the borax bearing properties for ore alleged to have been taken out by the Suckow interests and not accounted for to Borax Consolidated, all to the interest of the monopoly under

Defendant's Exhibit "A"—(Continued)

control of Borax Consolidated, the English corporation;

That in the meantime and on June 30, 1931, the petition in involuntary bankruptcy was filed against Suckow Borax Mines Consolidated, Inc., which is now on appeal.

That Borax Consolidated initiated all this litigation including the actions named, all and solely for the purpose of maintaining its world-wide monopoly as an English corporation and oppressing, harrassing and suppressing its sole competitor that he might be removed from the field of world competition;

That since this litigation was started, the price of borax has risen steadily and is now quoted at Thirty Dollars (\$30) per ton f.o.b. Los Angeles;

That Borax Consolidated, Ltd., has heretofore and is now harrassing and interfering with your petitioner in his management and operation of the borax properties for the purpose of maintaining the British monopoly of an American product; has threatened to and has attempted to intimidate your petitioner's customers and the purchasers of the product from the borax deposits held in co-tenancy; has demanded from time to time that your petitioner disclose the names of his customers and that your petitioner join with Borax Consolidated in the maintenance of a world-wide monopoly by determining the output, fixing the price and regulating the marketing of the products of the Kern County

Defendant's Exhibit "A"—(Continued)

borax deposits, all of which your petitioner has declined to do.

Dated January 27, 1934.

Respectfully submitted,

WM. H. NEBLETT,
ARNOLD A. ODLUM,
HIRAM E. CASEY,
FRANK BUREN,

By ARNOLD A. ODLUM,
Attorneys for Suckow Borax
Mines Consolidated, Inc.

SUCKOW BORAX MINES
CONSOLIDATED, INC.,

By JOHN K. SUCKOW,
President.

Attest:

FRANK BUREN,
Secretary.

State of California,
County of Los Angeles—ss.

John H. Suckow, being by me first duly sworn, deposes and says: That he is the president of Suckow Borax Mines Consolidated, Inc., petitioner in the above-entitled action; that he has read the foregoing Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein

Defendant's Exhibit "A"—(Continued)

stated upon his information or belief, and as to those matters that he believes it to be true.

JOHN K. SUCKOW.

Subscribed and sworn to before me this 27th day of January, 1934.

(Seal)

VERA L. McLAUGHLIN,

Notary Public in and for said
county and state.

In the District Court of the United States
Southern District of California,
Central Division

Before the Honorable Earl E. Moss, Referee in
Bankruptcy.

No. 16938-H

In the Matter of SUCKOW BORAX MINES
CONSOLIDATED, INC., a corporation, Bank-
rupt.

An Amendment to a Petition for Order to Show
Cause Why the Trustee in Bankruptcy Should
Not Execute and Deliver a Lease of the Entire
Alleged Bankrupt Estate.

Comes now Suckow Borax Mines Consolidated,
Inc., a corporation, and submits and files this its
amendment to a petition for order to show cause
why the trustee in bankruptcy should not execute
and deliver a lease of the entire alleged bankrupt
estate heretofore filed herein, and states and al-
leges as follows:

I.

That portion of Paragraph XI, beginning in sub-

Defendant's Exhibit "A"—(Continued)

paragraph on line 22 of page 4 of said petition, be amended to read as follows:

That in 1930, a suit was commenced entitled "Borax Consolidated, Ltd., a corporation, v. Suckow Borax Mines Consolidated, Inc., John K. Suckow, et al.," which was an action for an accounting, but after the petitioner herein was adjudicated a bankrupt, an amendment to the petition in the aforementioned cause was filed, the avowed purpose of which was to establish a lien upon the Suckow Borax Mines Consolidated's undivided one-half of the borax bearing properties for ore alleged to have been taken out by the Suckow interests and not accounted for to Borax Consolidated, all to the interest of the monopoly under control of Borax Consolidated, the English corporation.

* * * *

Dated February 12, 1934.

WM. H. NEBLETT,
ARNOLD A. ODLUM,
HIRAM E. CASEY,
FRANK BUREN,

By ARNOLD A. ODLUM,

Attorneys for Suckow Borax
Mines Consolidated, Inc.

SUCKOW BORAX MINES
CONSOLIDATED, INC.,

By JOHN K. SUCKOW,
President.

Attest:

FRANK BUREN,
Secretary.

Defendant's Exhibit "A"—(Continued)

State of California,
County of Los Angeles—ss.

John H. Suckow, being by me first duly sworn, deposes and says: That he is the president of Suckow Borax Mines Consolidated, Inc., petitioner in the above-entitled action; that he has read the foregoing Amendment to Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

JOHN K. SUCKOW.

Subscribed and sworn to before me this 13th day of February, 1934.

(Seal) VERA L. McLAUGHLIN,
Notary Public in and for said
County and State.

District Court of the United States, Southern
District of California, Central Division

United States of America,
Southern District of California—ss:

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing is a full, true, and correct copy of a Portion of Petition, and a portion of an amendment to Petition for order to Show Cause, etc., attached to Certificate on Review, filed in my office July 10th, 1934, in the Matter of Suckow Borax Mines Consolidated, Inc., Bank-

Defendant's Exhibit "A"—(Continued)

ruptcy case No. 16938-H, as the same appears from the original record remaining in my office.

Witness my hand and the seal of said Court, this 29th day of March, A.D. 1948.

(Seal) EDMUND L. SMITH,
Clerk,

By /s/ REX LAWSON,
Deputy Clerk.

[Endorsed]: Filed 4/3/48.

[William H. Neblett Letterhead]

January 30, 1934

Hon. Harry Hollzer,
Federal Bldg.,
Los Angeles, Calif.
My dear Judge Hollzer:

In re Borax Consolidated, Ltd. v. John K.
Suckow—In Equity C-107-H.

It must now be apparent to the court that this action and the other litigation fostered and prosecuted by the plaintiff is an attempt to maintain the monopoly which Borax Consolidated has in the borax industry. The destruction of the one competitor of the plaintiff is the only objective of this action.

True, the plaintiff through its counsel and directing genius, as any good strategist would do, has carefully screened from the court its real intentions, hoping to take, by this ruse, the Suckow

Defendant's Exhibit "A"—(Continued)

ground and hold it fortified by the judgment of this court. Proof of plaintiff's purposes, if theretofore lacking, was established by its letter to the court of January 15, in which the defendant Suckow's attempt to halt the uninterrupted successes of the plaintiff, was actually resented. The confession of plaintiff's intentions is found in the last paragraph of that letter, quoted again in the memorandum of January 25, where it is claimed that there should be no delay in signing the judgment because Dr. Suckow has made transfers of his individual property beyond the reach of the proposed judgment except by a suit to set aside the transfers.

The unlawful and monopolistic plan of the plaintiff appears in Plaintiff's Exhibit 8, the letter of October 4, 1927, where it is said:

"As the market for this ore is limited, we insist that each owner is entitled to participate in the marketing of every part of the ore extracted and profits divided on basis of ownership."

Further upholding this view of a monopoly is the failure of the plaintiff to take advantage of the order of the court fixing \$21.89 as the price to each party of the ore at the mouth of the shaft. The plaintiff has not taken advantage of this order made at its request. Rather, it has preferred to use the court as an unwitting instrument of oppression by obtaining a judgment with which the plaintiff plans to eliminate from the borax field its one competitor, Suckow.

With unequalled bravado the plaintiff declaims to

Defendant's Exhibit "A"—(Continued)

the court in paragraph IX of its sworn complaint that it is engaged in interstate and international commerce, and that the defendant is guilty of unfair competition because its operations tend to interfere with its monopoly.

The plaintiff is a monopoly of the worst sort. It confesses in its complaint that the great majority of its business is interstate and international commerce. Its acts violate the provisions of Sections 1 to 7 of the Sherman Anti-Trust Law, USCA Title 15, page 4 et seq. The plaintiff should be condemned for the ingenious scheme it is using of invoking the aid of the court to frustrate the laws of the nation and to sustain its unlawful monopoly.

This is a suit in equity. The court is asked to give a judgment in violation of the statutes of the United States.

The principle that equity will not give any relief to a party, or suffer him to make any defense that violates the statutes or laws of the Federal or state governments has been upheld by every court in the land. The plaintiff has no standing in the state courts. (*Morey v. Paladini*, 187 Cal. 727). That case and many other California cases hold that, once it appears that a plaintiff has been guilty of unconscionable conduct or has done or participated in any acts which contravene the laws of public policy of a state or the nation, he will be denied any relief. The case cited also holds, in accord with the unconflicting and ancient line of authority, that such question may be raised at any time, even upon ap-

Defendant's Exhibit "A"—(Continued)

peal, and that the court will act of its own motion and dismiss the action if it discovers the fact of unconscionable conduct or violation of law.

Defendants are informed that so complete is the monopoly in the plaintiff that the borax industry has not adopted any code of fair competition under the National Recovery Act. It is obvious that, with its sole competitors, the defendants, being temporarily out of business and the plaintiff supreme in its monopoly, the plaintiff would not consider a code necessary for the conduct of the monopoly.

The court should not only refuse to sign the findings, but should dismiss the action.

Yours truly.

WM. H. NEBLETT.

WHN:M

A copy of this letter has been sent to Newlin & Ashburn.

EXHIBIT "A"

March 12, 1930

Mr. William E. Colby,
Mills Building
San Francisco, Calif.

My dear Mr. Colby:

Your letter of March 8th and the enclosed opinion relating to the matter of Borax Consolidated, Limited, vs. Suckow were received by me on Monday morning, and I have spent a large part

Defendant's Exhibit "A"—(Continued)

of my time since then studying the matter. I very much appreciate the suggestions which you made and the very exhaustive and able opinion which you submitted. I have redrafted the bill so as to incorporate to the extent of my ability and in most respects the suggestions which you made, and will forward the redraft of the bill to you either in this letter or under separate cover.

I have discussed with our client the matter of a partition suit to date they have rejected the suggestion because of the improbability of their being able to enforce any bid which Suckow, or his representative, might make. In other words, he does not have to put up a bond and the only remedy would be an action at law to enforce the bid or a re-sale with an action for the difference; if meantime the property had been bought in at a re-sale there would be very little, if anything, of a tangible nature out of which to collect the judgment.

Our client is also advised of the possibility that the accounting action may result in an adverse judgment, but notwithstanding this fact, has concluded to pursue the matter at this time. Mr. Moreau, the company bookkeeper, made a transcript some months ago of most of Dr. Suckow's books and while the information thus obtained is wholly unsatisfactory, he and Mr. Dudley have so analyzed it as to indicate a very substantial profit on operations prior to the Gembo contract. Suckow, as you know, presented a further but partial statement of account during the taking of his deposition.

Defendant's Exhibit "A"—(Continued)

Pursuant to the stipulation there made, Mr. Dudley has obtained or is obtaining, such further information as the Suckow books disclosed. Of course, the burden is on him to account and if his books are inadequate, all matters of doubt would be resolved against him as they were in the other suit. Moreover, it is extremely unlikely that the accounting suit would result in a money judgment against the Borax Company. If it should appear that the operations had been conducted at a loss (after taking into consideration the capital expenditures, etc.), the best that Suckow could expect would be a judgment to the effect that he have a lien upon the Borax Company's half of the property to the extent of half of the loss, and that upon satisfaction of the said lien, half of all of the improvements would belong to the Borax Company (see *Higgins v. Eva*, 75 Cal. Dec. at 727). In view of all these matters, it seems advisable to start the action and reduce the matter to judgment as soon as possible. There are also policy reasons which make it seem to our client desirable to do this. (Emphasis supplied.)

I am convinced that we can maintain an equity action and secure an accounting with respect to all of the ore which has been heretofore sold by Suckow, notwithstanding the apparent adverse nature of the McCord decision. I also think it easier to maintain this position in the Federal Court, and for many reasons that seems the preferable tribunal. I am not convinced, however, that the measure of net

Defendant's Exhibit "A"—(Continued)

profit would be what Suckow should have received as distinguished from what he did receive for the ore, unless we first establish a definite ouster on his part. Be that as it may, it seems to me that for the present purposes we might well rest upon the proposition that notwithstanding the language of the McCord and similar decisions, the statute of Anne has become a part of the law of this state through the adoption of the common law (and on such questions as these the Federal Court is not bound, as I understand it, by the state decisions), and that Suckow, in selling the ore, was at all times trustee or bailiff for the Boxas Company as well as himself and his accountability measured by his actual profits; this position would be advantageous to us in any injunction proceeding.

In other words, I have no substantial doubt of our ability to maintain the action itself and procure an accounting. The thing which bothers me, however, is the question of any injunction. After considering your opinion, I am more doubtful than ever about our ability to obtain that relief, but these practical considerations appeal to me: Unless motion for temporary injunction is made, Suckow, will go along to suit himself, pursuing all of the objectionable practices in which he is now engaged; if we fail in our attempt to procure a temporary injunction, it will be, in my judgment, because of an offer made in that proceeding to segregate the ore, leaving one pile for us to take when we please; you

Defendant's Exhibit "A"—(Continued)

will note that in the redraft of the bill I have sought to discount the effect of such an offer when and if made; in the light of these allegations, I think it reasonably certain that we can in the event of denial of injunction, procure an order which will be expressly conditioned upon Suckow's making a continuous and a fair segregation of the ore. The cost of production at the mouth of the mine is now at least \$3.00 per ton, almost twice the Borax Company's cost at its Kramer Property. If Suckow has to produce two tons for each ton that he takes, it costs him in cash \$6.00 per ton to perform his Gembo contract before the ore has ever left the mouth of the mine, and all that he gets to offset this \$6.00 is a possible lien on the Borax Company's half for \$3.00 and the proceeds of the Gembo contract. If our people are right, to the effect that the Gembo contract cannot be performed at a profit in the face of present market prices, this segregation of the ore will break Suckow's back before long.

There is only one thing that can prevent it and that is an increase in market prices, which would, as you know, be most acceptable to our client. Perhaps this conditional order would be the fulcrum upon which they could pry Suckow into some kind of sensible cooperation. It seems to me, therefore, that it is well worth while for us to attempt to procure a temporary injunction and that the move cannot result in any real detriment to us. At most,

Defendant's Exhibit "A"—(Continued)

it will give Suckow a temporary flush of victory, which will, however, quickly dissipate when he finds that he is breaking his own back. (Emphasis Applied.)

Mr. Baker and Mr. Zabriskie will be in Los Angeles on one of their customary visits about the first of April, Mr. Baker has it in mind to have a conference of some kind with Suckow at that time and it seems to me that if we should file our suit and have our application for temporary injunction so noticed that it would be returnable a few days after Mr. Baker's arrival, the state would be very nicely set for an advantageous conference. (Emphasis supplied.)

I note what you say about procuring from Suckow a definite refusal to permit the Borax Company to occupy the premises jointly with him, I have not the deposition before me, but am inclined to think that that testimony, coupled with the attorney's advice there shown and the correspondence about which he there testified, are sufficient to establish an ouster. I never am able to get a definite Yes or No out of Suckow on anything, and I very much fear that if we made a new demand upon him, we would either meet with complete silence or an equivocal answer which would leave us in no better position than that which we now occupy.

I have noted what you said about joining Gembo as a defendant. It seems to me, however, that it is

Defendant's Exhibit "A"—(Continued)

a good tactical move, in the first place, because of the effect on both Suckow and Gembo. Moreover, I fear that the Gembo might be held an indispensable party, in which case its absence would be fatal to the suit; on the other hand, if Gembo is held an improper party, it can be dismissed and no harm has been done to any one. (Emphasis supplied.) I am also sending you with the redraft of the bill a copy of affidavits which I have just received from Mr. Baker and Mr. Johnson relative to European market prices and costs. These can, of course, be supplemented by local affidavits as to costs on this side of the water.

As soon as you have had an opportunity to consider this redraft of the bill, I would like to have you get in touch with me by telephone or otherwise, and unless you are entirely satisfied to follow the procedure here outlined, I would like to have a conference with you at the earliest possible date either in San Francisco or Los Angeles as may prove to be mutually convenient.

Very truly yours,

/s/ A. W. ASHBURN,

Of Newlin & Ashburn.

AWA:K CC—Mr. C. M. Rasor

[Endorsed]: Filed: Mar. 26, 1945. C. W. Calbreath, Clerk.

Defendant's Exhibit "A"—(Continued)

United States of America,
Northern District of California—ss:

CERTIFIED COPY

I, C. W. Calbreath, Clerk of the United States District Court in and for the Northern District of California, do hereby certify that the annexed and foregoing is a true and full copy of the original Exhibit "A" in the case of United States of America, vs. Borax Consolidated, Ltd., et al., Civil action No. 23690-G, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at San Francisco, Calif., this 8th day of April, A.D. 1948.

(Seal) C. W. CALBREATH,
Clerk.

[Endorsed]: Filed April 7, 1948.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF FRANK
BUREN IN OPPOSITION TO MOTIONS TO
DISMISS

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Frank Buren, being first duly sworn, deposes and says:

That at the time he first became associated with the late Dr. John K. Suckow and his corporation, Suckow Borax Mines Consolidated, Inc., he found that it was a common practice for Dr. Suckow, his attorneys and others working with them on the Bankruptcy Case and the Equity Case to use the term "Borax Trust" when referring to the Borax Consolidated, Ltd., or the Pacific Coast Borax Company or the United States Borax Company. That affiant recalls having inquired of Dr. Suckow and his then chief counsel, the late Walter Haas, why, if the said corporations were a trust in the sense that they were controlling or monopolizing the borax business, Suckow did not proceed against them under the anti-trust laws and also use this as a defense in the said bankruptcy and equity cases. That their reply, in substance, to this query was that while they knew the said corporations were trying to control the output of mined borax ore, as distinguished from borax obtained from the lake brines, they had not yet succeeded in acquiring such control and the Suckow interests would not be able

to prove in court that they (Borax Consolidated and affiliates) were violating the law, especially since the Suckow Company and the Western Borax Company were at that time (1932) mining, calcining and selling a considerable quantity of borax ore. That in addition to this crude borax coming from the mines of the Suckow and Western companies, substantial quantities of refined borax obtained from the waters or brine of Searles Lake were being sold in the markets of the world, apparently in competition with the so-called "Borax Trust" by the American Potash & Chemical Company and the Stauffer Chemical Company. That is to say, at that time and on through the entire period of affiant's connection with the Suckow interests, terminating early in the year 1940, affiant believed that the American Potash & Chemical Company and the Stauffer Chemical Company, and the Western Borax Company (until its purchase by Borax Consolidated) were active and legitimate competitors of Borax Consolidated, Ltd., and its subsidiaries, Pacific Coast Borax Company and United States Borax Company.

That during all of said period affiant knew of his own knowledge, from statements made to him by Dr. Suckow and his counsel, that neither Dr. Suckow nor any of his various attorneys appearing in said cases, had any tangible or competent evidence, or even any belief, that the said Borax Consolidated, Ltd., and affiliates (Pacific Coast Borax Company and United States Borax Company) referred to by them as the "borax trust" were in fact

monopolizing or controlling the borax business, or had any agreement with the other borax producers, such as American Potash & Chemical Company and Stauffer Chemical Company, to control such business. That if Dr. Suckow or his counsel had any such evidence or belief affiant was in position to have known about it, because in addition to his duties as secretary of the Suckow corporation, he acted as the company's office manager and conducted its correspondence in selling and shipping its calcined borax ore to the company's European customers, under Dr. Suckow's direction. That further in his capacity as Dr. Suckow's personal attorney and one of the Suckow corporation's attorneys, affiant participated in all conferences between the Doctor and his various other counsel and knew their plans for offensive and defensive legal action.

That in the course of his controversy with the so-called "Borax Trust," Dr. Suckow had on his legal staff at various times one or another of most of the prominent legal firms of Los Angeles, among which were Gibson, Dunn & Crutcher, Lawler & Degnan, Haas & Dunigan, O'Melveny, Tuller & Myers, and McAdoo & Neblett. That the pleadings and trial of both the Bankruptcy Case and the first trial of the Equity Case (No. C-107-M) were conducted by the late Walter Haas. That the proceedings leading to the reopening of the said Equity Case were conducted by the firm O'Melveny, Tuller & Myers. That as is well known, this latter firm is, or at that time was, one of the largest, ablest and best quipped law firms in the State of California,

with offices occupying an entire floor in the Title Insurance and Trust Building, in Los Angeles. That affiant conferred with them frequently during the time they were engaged on the Suckow case and knows that they exhausted every legal means of defending the Suckow interest in this suit and had there been any known competent evidence that the plaintiff (Borax Consolidated, Ltd., and subsidiaries) were all or any part of a combination in restraint of trade, or participating in an illegal conspiracy, to monopolize or control the borax business, this firm certainly would have taken advantage of it at that time.

That affiant heard the arguments of counsel for the defense in the present case made on April 7th and has read the transcript of proceedings on April 3rd, wherein they contend that the pleadings in the Equity case and the Bankruptcy case, verified by Dr. Suckow, and the statements of Mr. Tuller and Mr. Neblett of Suckow counsel, support their contention that Dr. Suckow and said counsel had knowledge of the fact that defendants herein were engaged in a conspiracy to control the output and price of borax, long prior to the adjudication of the Government's case against certain of said defendants. That affiant knows of his own knowledge, from statements made to him by Dr. Suckow, Mr. Tuller and Mr. Neblett that neither of them had any such knowledge or information, and that if they had had any competent evidence of such character they would have used it against the plaintiffs in the Equity and Bankruptcy cases.

That affiant knows of his own knowledge that the

principal purpose of Dr. Suckow and the Suckow corporation in appearing before the United States Senate Committee and presenting the said corporation's bankruptcy case to this committee, was in furtherance of the hope that said committee might, through the use of its powers to summon and examine witnesses, obtain evidence as to whom were responsible for the filing of the petition in involuntary bankruptcy against the Suckow corporation. That, as the transcript of the proceedings before said committee will show, when the attorney for the petitioning creditors in said bankruptcy case was asked, under oath, who had paid the expenses in that case, he declined to answer, and though threatened with citation for contempt of court, he persisted in such refusal and never did answer the question.

That had this question been answered, correctly, it would have supplied an important link in the chain of evidence needed at that time to uncover the 1929 conspiracy of which the Suckow interests then had no knowledge or information whatsoever.

That affiant knows of his own knowledge that Dr. Suckow would not have entered into the said agreement of 1934 had he not been forced to do so by financial circumstances. That due to the long series of litigations in which he had engaged, and the fact that his mine had been closed and no further income was being received from his borax business, he had become financially embarrassed to the extent that it became necessary for him to borrow money in small sums from personal friends and associates and toward the last was even compelled to give a chattel

mortgage on his household furniture in his residence at 1283 Third Avenue, Los Angeles, California, in order to obtain funds to pay for the transcripts on appeal and other incidental expenses in connection with this litigation. That in this connection affiant knows of his own knowledge, because he prepared the letter for Dr. Suckow's signature and saw him sign it, that he wrote to Eduard Bruckner, his representative in Hamburg, Germany, for a personal loan of \$1,000, which was received in due course, and later asked Mr. Bruckner to endeavor to obtain larger sums of money for the Dr. Suckow's use in said litigation from other borax customers in Germany and England, which was not received.

That in this same connection, Dr. Suckow, under date of July 16, 1933, wrote the following letter to John Stauffer, Sr., who was the founder and then president of the Stauffer Chemical Company at San Francisco, California, one of the defendants herein:

“My dear Mr. Stauffer:

“It has been a long time since I last saw you, and in the meantime I have had a great deal of trouble. Just now I am in a particularly difficult situation and I am wondering, Mr. Stauffer, if you could find it possible to come to my assistance, financially. Anything at all that you could do for me would be very greatly appreciated. I feel sure that we could work out something satisfactory to both of us if I could come up to San Francisco and have a talk with you.

“Please consider for a little while what I have

asked before answering, and if you think that any deal regarding the borax business would be out of the question, perhaps you could, anyway, help me out a little, in the way of a loan—I could give you very good security, and whatever dealings we might have would be kept in the strictest confidence.

“The last time I saw John he mentioned that you were not quite well, but I sincerely hope that you are feeling much better now, and that you will allow me to come and see you.

“Any suggestions that you might offer will be well received. An answer at your earliest convenience will be greatly appreciated.

“My kindest regards to yourself and Mrs. Stauffer.

“Most sincerely,

/s/ JOHN K. SUCKOW.”

That no answer was ever received to the above letter by Dr. Suckow.

That affiant knows of his own knowledge from statements made to him by Dr. Suckow that he did not at this time know, nor did he at any time during the remainder of his life know, that the Stauffer Chemical Company was a party to the said general conspiracy of 1929, or that there was any such conspiracy.

That affiant knows of his own knowledge that on or about March, 1934, Dr. Suckow in connection with his said financial embarrassment sold a 10% interest in his entire holdings in the borax business for the sum of Four Thousand (\$4,000.00) Dollars

to Mr. Joseph Jensen, which sum was only a fraction of the real value of said holdings.

Affiant knows of his own knowledge that up until the last day before Dr. Suckow executed the contract for the sale to the Borax Consolidated, Ltd., on August 15, 1934, that he was still opposed to making the deal and was resorting to every possible means to raise money which would enable him to hold on to his property and it was not until he had sent a telegram to the Clerk of the United States Circuit Court of Appeals at San Francisco, inquiring whether a decision had been rendered in the Suckow Bankruptcy case and had received a negative reply on August 14, 1934, and after he had received the following letter from Mr. Allen Ashburn, demanding that the contract be signed, that Dr. Suckow permitted the transaction to proceed:

“August 13, 1934.

“Mr. Frank Buren,
891 Crenshaw Boulevard,
Los Angeles, California.

“In re: Suckow Purchase.

“Dear Sir:

“Referring to the proposed purchase by Pacific Coast Borax Company of the Suckow properties and the revised papers which we sent you in our letter of August 8, 1934.

“In view of matters which we have just discovered and which I mentioned to you on the telephone on Saturday, we are now authorized to say to you, and to Dr. Suckow and his wife through copy of this letter, that unless this matter is placed in escrow

by the close of business hours on Wednesday, August 15, 1934, the deal automatically expires and any offer of Pacific Coast Borax Company at that time are withdrawn.

“We are sending copy of this letter to the Trustee in Bankruptcy and his attorney.

“Very truly yours,

/s/ A. W. ASHBURN
of Newlin & Ashburn.

AWS:S

“CC to Dr. John K. Suckow, Mr. Walter Moses, Mr. Hubert F. Laugharn, Mr. F. M. Jenifer.

/s/ FRANK BUREN,
Affiant.

Subscribed and sworn to before me this 13th day of April, 1948.

(Seal) /s/ JUSTIN P. SMITH,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed April 13, 1948.

[Title of District Court and Cause.]

Action for treble damages brought pursuant to 15 U.S.C.A. 15. Motion for dismissal granted in accordance with opinion.

Thurman W. Arnold of Washington, D. C., and Sterling Carr of San Francisco, California, attorneys for plaintiffs.

Ray J. Coleman, Coleman & McDonald, all of Los Angeles, California, Maurice E. Harrison, Moses

Lasky and Brobeck, Phleger & Harrison, all of San Francisco, California attorneys for defendants Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, James M. Gerstley, Frank M. Jenifer and Bank of America National Trust and Savings Association as Executor of the Last Will and Testament of Clarence M. Rasor, Deceased.

Vincent H. O'Donnell of San Francisco, California, attorney for defendant Stauffer Chemical Company.

John L. Reith of Oakland, California, attorney for defendant West End Chemical Company.

Oliver & Donnally, Fulton, Walter & Halley, all of New York City, New York, and Charles A. Beardsley of Oakland, California, attorneys for defendant American Potash & Chemical Corporation.

MEMORANDUM OPINION

Roche, District Judge: Plaintiffs bring this treble damage action under the Federal Anti-Trust Laws, 15 U.S.C.A. § 15 and 15 U.S.C.A. §§ 1 and 2, to recover \$15,000,000.00 for damages alleged to have been sustained by them as a result of a general conspiracy on the part of the defendants, unlawfully and in violation of the Sherman and Clayton Acts, to monopolize and restrain trade in the borax industry.

Plaintiffs allege that this said conspiracy came into existence in 1929 and continue in force up to and through the date of the commencement of this action, September 11, 1947. Plaintiffs complain that this conspiracy was a fraud upon them which resulted in the destruction of their businesses and that

they, the plaintiffs, only acquired knowledge of the existence of such conspiracy in 1944 as a result of an action brought at that date by the United States against certain of the defendants for alleged violations of the Federal Anti-Trust Laws.

The complaint further alleges that certain overt acts in furtherance of the conspiracy took place from 1913 to 1942, with the following results.

In 1913, John K. Suckow, whose estate is a party plaintiff, sold to the defendant United States Borax Company (hereafter referred to as U.S.B.C.), for \$4,500.00, all of his interest in a certain piece of California property containing a deposit of colemanite, which is a source of borax. In 1917, John K. Suckow (hereafter referred to as Suckow) sold a 75% interest in a similar piece of property to defendant Stauffer Chemical Company for the sum of \$60,000.00 and in consideration of the holding by him of the position of manager in the operating company that was to work the mineral deposit. In 1918, Suckow, the Stauffer Chemical Company and defendant Pacific Coast Borax Company (hereafter referred to as P.C.B.C.) entered into an agreement creating the Suckow Chemical Company, with Suckow controlling the company and owning certain shares of its stock. Plaintiffs allege that Suckow was prevented from ever carrying on or operating the Suckow Chemical Company as had been contemplated and that for this reason, Suckow, in 1925, sold all of his stock in the Suckow Chemical Company to defendant P.C.B.C. for \$150,000.00. Suckow paid \$10,000.00 as commission for such sale to one Victor C. Emden, in ignorance of the alleged fact

that Emden was acting as agent for P.C.B.C. at the time of the sale.

In 1918, an agreement was entered into between Suckow and U.S.B.C. providing that each should have a full one-half interest in certain mining locations (for which claims had been filed by Suckow in 1916) to which patents were to be acquired by U.S. B.C. (whose interest was derived from a third party who had made adverse claims to certain of the locations in 1917). This agreement of 1918 was performed in part, but subsequent events led to the declaration by each that the other was failing to perform according to the agreement. This led to an action which was instituted by the Borax Consolidated, Ltd. (hereafter referred to as B.C.L.) in 1927 in the Superior Courts of California, whereby an injunction was sought against mining operations by Suckow on certain of the property involved in the 1918 agreement, an accounting by Suckow to the plaintiff B.C.L. and a determination of the rights of B.C.L. This action was dismissed by B.C.L. in 1930. In 1929 Suckow brought action against U.S.B.C. and certain of the other defendants herein to compel the transfer to him of an interest in certain mining properties according to the 1918 agreement. This action ended in a consent judgment being entered according to an agreement of 1934 as hereafter described.

In 1929 the Suckow Borax Mines Consolidated, Inc. was created and John K. Suckow transferred all of his mining properties to such company (hereafter referred to as the Suckow Company).

In 1930 B.C.L. brought an action in the United States District Court, seeking an injunction restrain-

ing the Suckow Company from further mining operations, damages and an accounting from the Suckow Company. The injunction was denied but the plaintiffs allege that the Suckow Company was forced to cease its mining operations because of the allegedly exorbitant value placed upon the ore as a result of the trial upon this action in 1932. In 1931 P.C.B.C. and others of the defendants caused an involuntary petition in bankruptcy to be filed against the Suckow Company, causing the Suckow Company to be duly adjudged a bankrupt in 1933, with a trustee appointed to manage it. The Suckow Company made an appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit, but dismissed such appeal as a part of the agreement of 1934. In 1934, P.C.B.C. secured a lease of the mining properties of the bankrupt company for a period of five years. Plaintiffs then proceeded upon further litigation to contest this lease. In 1932, P.C.B.C. brought a patent infringement action against the Suckow Company and an injunction was issued by the U. S. District Court restraining the Suckow Company from using a particular method of calcining borax. An appeal was likewise taken from this order.

In 1934, an agreement was entered into between the plaintiffs and P.C.B.C. providing for the transfer of certain parcels of real property to P.C.B.C., the payment of \$150,000.00 to Suckow, the release of all possible claims against any of the defendants, the mutual dismissal of all legal actions by each of the parties against any of the others and the granting of another lease from the trustee of the bankrupt company's property. In 1938, the bankruptcy pro-

ceedings were terminated and the property restored to the Suckow Company, subject to the terms of the lease mentioned. In 1942, the plaintiffs sold to the defendants all of the mining property that had been involved in the prior transactions, receiving therefor the sum of \$350,000.00.

The plaintiffs further allege that the defendants caused a destruction of some of their mining properties during the period defendants were in possession under the lease and that the defendants also caused the destruction of the business possessed by the plaintiffs with certain European companies, which offered the only outlet for plaintiff's product.

Plaintiffs claim that all of these events were caused or entered into by them only because of harrassments, persecutions and threats on the part of the defendants and that plaintiffs were unaware of the general conspiracy among the defendants to monopolize the borax industry.

It is plaintiffs' position that this action is brought upon the existence of the general conspiracy and the damages suffered therefrom. The above described affairs are presented by plaintiffs not as the basis of the cause of action for damages, but as evidence of overt acts on the part of the defendants for the purpose of proving the existence of such conspiracy.

To summarize, plaintiffs present their case according to the following points. This is an action in equity upon the continuing conspiracy, which originated in 1929, with overt acts shown only for the purpose of demonstrating such conspiracy. The statutes of limitation are not controlling, since this is not an action at law, but if they were controlling,

they would be tolled by reason of a Federal moratorium statute running from 1942 to 1946. In addition, an action by the United States under the Anti-Trust Laws against certain of the defendants, commenced in 1944 and terminating in 1945, suspended any statutes of limitations for that period by reason of the provisions of 15 U.S.C.A. 16. Fraud on the part of the defendants in denying their violations of the Anti-Trust Laws prevents, under the applicable California law, the statute of limitations from beginning to operate until discovery by the plaintiffs of their cause of action.

Defendants answer with the following arguments. This is a legal action to which the statutes of limitation are applicable. The only cause of action available to private parties under the Anti-Trust Laws is that for damages suffered, not the mere existence of a conspiracy in violation of such statutes. The California statute of limitations has run on all of plaintiffs' possible causes of action as established by the pleadings, except for any injuries or damages that might have been suffered in 1942. The statute has not been tolled by reason of fraud on the part of the defendants, since a denial of a violation of law does not constitute fraud. The Federal moratorium statute is not applicable to suits by private parties. There is a failure on the part of the plaintiffs to state a cause of action for any damages alleged to have been suffered in 1942. There were releases made by the plaintiffs of all existing or by them with the defendants. The defendants move to dismiss for failure to state a claim upon which

relief may be granted, to dismiss because the action is barred by the statute of limitations and for a summary judgment.

The questions immediately presented are: (1) is this an action at law or an action in equity; (2) if this be an action at law, does the California statute of limitations bar any of the plaintiffs' possible causes of action; and (3) is there any cause of action pleaded by the plaintiffs upon which relief may be granted?

This is an action at law, *Burnham Chemical Company v. Borax Consolidated, Ltd., et al.*, (C.C.A. 9)F. (2d), decided October 27, 1948; *Meeker v. Leheigh Valley Railroad Co.*, 162 F. 354; *Hartford-Empire Co. v. Glenshaw Glass Co.*, 3 F.R.D. 50; and not a suit in equity, *Fleitman v. Welsbach Street Lighting Co.*, 240 U. S. 27; *Burnham Chemical Company v. Borax Consolidated, Ltd.*, *supra*; *Meyer v. Kansas City Southern Ry. Co.*, 84 F. (2d) 411; to which the state statute of limitations applies. *Chatanooga Foundry etc. v. Atlanta*, 203 U. S. 390; *Barnes Coal Corp. v. Retail Coal Merchants Assn.*, 128 F. (2d) 645; *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742, cert. den. 299 U. S. 390; *Mormand v. Paramount Pictures Distributing Co.*, 36 F. Supp. 568.

California Civil Code § 338, subd. 1., provides a three years statute of limitations for liabilities created by statute other than for a penalty or forfeiture.

The cause of action in a suit brought under 15 U.S.C.A. § 15 is for injuries suffered as a result of a conspiracy in violation of the Anti-Trust Laws

and not the existence of the conspiracy itself. *Burnham Chemical Company v. Borax Consolidated, Ltd.*, supra; *Foster & Kleiser Co. v. Special Site Sign Co.*, supra. The Fourth Circuit Court of Appeals has expressed the law in *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F. (2d) 885, at page 887:

“In a civil suit under this section, the gist of the action is not merely the unlawful conspiracy or monopolization * * *, but is damage to the individual plaintiff resulting proximately from the acts of the defendant which constitute a violation of the law. A mere conspiracy with intent to violate the law while it may be the basis of a valid indictment under the criminal sanction of the Anti-Trust Act, does not give rise to a personal civil suit for damages.”

All of the cases cited by the plaintiffs as upholding their contention that the existence of a conspiracy is in itself sufficient basis for a cause of action are cases of criminal prosecution by the government. A private action for damages is not an action for the common good, *Shurtz v. Foster & Kleiser Co.*, 29 F. Supp. 162; and the fact that a criminal action may be instituted by the government by reason of the existence of a conspiracy to violate the Anti-Trust Laws does not add to the right given to private individuals to sue for damages caused by such a conspiracy. *Burnham Chemical Company v. Borax Consolidated, Ltd.*, supra.

The statute of limitations in California runs from the date when the injury was inflicted and the damage was suffered. *Rose v. Dunk-Harrison Co.*, 7 Cal. App. (2d) 502; *Lathing v. Gillette*, 95 Cal. 317. While the existence of fraud may create an exception to

this rule, *Pashley v. Pacific Elec. Ry. Co.*, 25 Cal. (2d) 226; such fraud needs, as appears from the cases cited by the plaintiffs themselves, to be a positive concealment of the facts giving rise to the cause of action despite a duty to disclose such facts. In none of the cited cases is there any rule to the effect that a mere denial of a violation of law constitutes a fraud upon the injured party so that the statute is tolled by reason of the exception to the general rule. Too, the record seems to firmly establish the fact that the plaintiffs knew, or had reason to believe, that the acts of the defendants which caused the claimed damages were a violation of the Anti-Trust Laws. Such fact precludes plaintiffs from availing themselves of this exception which would toll the statute of limitations until the alleged date of discovery in 1944.

The complaint recites at length a series of events taking place between 1913 and 1934 and culminating finally in the sale of property by the plaintiffs to the defendants in 1942. Allegedly, these events were caused by the conspiracy which is the basis of this action. It is these events themselves however, which form the basis of any causes of action under the Anti-Trust Laws. As the above discussion shows, the California statute of limitations is a bar for any of the plaintiffs' possible causes of action arising from 1913 to 1934. Apart from such bar however, no cause of action is stated by any of the claims made by the plaintiffs, including any claim with respect to the transaction of 1942.

In order to obtain treble damages for an alleged conspiracy and combination in restraint of trade,

the complaint must affirmatively show injuries to plaintiffs' business or property and it is insufficient merely to allege violations of the Anti-Trust Laws and to claim damages resulting therefrom. *Westmoreland Asbestos Co. v. John-Manville Corp.*, 30 F. Supp. 389. The instant complaint fails to affirmatively allege any injuries suffered by reason of the defendants, alleged violations of the Anti-Trust Laws. In every transaction with the defendants the plaintiffs have received consideration or an adjudication of their rights by a court having jurisdiction.

The 1942 sale well illustrates this failure common to all of the plaintiffs' possible causes of action as stated in the complaint. Plaintiffs allege a sale of property to the defendants in consideration of receiving \$350,000.00 and further allege that such sale was caused by the conspiracy of the defendants. There is no allegation of damages suffered or injuries received by the plaintiffs. On the face of the complaint, the price received by the plaintiffs does not appear to be inadequate consideration. In a like manner, the complaint fails to affirmatively show injuries to plaintiffs' business or property for any of the transactions or events delineated. Simply stated, the complaint alleges damages by reason of the alleged existence of the conspiracy. A mere claim of damages by reason of the existence of a conspiracy is not sufficient to state a cause of action, for a plaintiff must have received some injury in order to be able to sue under the Anti-Trust Laws. *Gibbs v. McNeeley*, 102 F. 594; *Noyes v. Parson*, 245 F. 689.

In accordance with the foregoing and in answer to the questions raised at the beginning of this discus-

sion, this Court holds that this is an action at law, in which no cause of action lies by reason of the bar of the applicable California statute of limitations, and by reason of the failure of the complaint to state a claim upon which relief may be granted. Therefore,

It Is Hereby Ordered that the motion of the defendants to dismiss the complaint for failure to state a claim upon which relief may be granted be and the same hereby is Granted and said complaint is hereby Dismissed.

Dated November 22, 1948.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Entered in Civil Docket Nov. 24, 1948.

[Endorsed]: Filed Nov. 22, 1948.

[Title of District Court and Cause.]

NOTICE OF MOTION TO ALTER OR AMEND
THE JUDGMENT OF DISMISSAL HERETOFORE
ENTERED HEREIN UPON NOVEMBER 22, 1948.

To Defendants, above named, and to Their Respective Attorneys:

You, and each of you, Will Please Take Notice that upon the 13th day of December, 1948, plaintiffs above named will move the above-entitled Court at its Courtroom in the Post Office Building, Seventh and Mission Street, in the City and County of San Francisco, State of California, at the hour of Ten

o'clock a.m., or as soon thereafter as counsel can be heard, for an order altering or amending the judgment of dismissal heretofore filed herein upon the 22nd day of November, 1948, by striking therefrom the last two paragraphs of said judgment and inserting in lieu thereof the following:

"It is hereby ordered that plaintiffs, above named, may, if they so elect, move this Court for an order permitting them to amend their complaint on file herein, said motion, if any, to be made on or before ten (10) days from the date of this order permitting the filing of such motion to amend."

/s/ THURMAN ARNOLD,

/s/ STERLING CARR,

Attorneys for Plaintiffs.

Points and Authorities in Support of
Foregoing Motion:

R.C.P. Rule 59(e)—*Louisiana Farms, etc., v. Great Atlantic, etc.*, 131 Fed. (2) 419.

Stevens Co. v. Foster & Kleiser Company, 311 U. S. 255, 61 S. Ct. 210, particularly page 261 of Official Report.

United States v. Standard Oil Company, etc., 7 F.R.D. 338, particularly Subdv. (3).

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 2, 1948.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO AMEND OR
ALTER JUDGMENT

It Is Ordered that the plaintiffs' motion to amend or alter the judgment entered herein on November 24, 1948, be and the same hereby is Denied.

Dated December 17, 1948.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Dec. 17, 1948.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 27646-R

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation, et al.,

Plaintiffs,

vs.

BORAX CONSOLIDATED, LTD., a corporation,
et al.,

Defendants.

JUDGMENT

Defendants' several motions to dismiss the complaint having been granted, and the complaint dismissed, and plaintiffs' motion to alter or amend judgment having been denied,

It Is Hereby Ordered, Adjudged and Decreed

that the action herein be and it is hereby dismissed against each and all of the defendants, with prejudice, with costs to defendants, and that plaintiffs take nothing by their action.

Dated December 18, 1948.

/s/ MICHAEL J. ROCHE,
District Judge.

Not Approved.

Approved as to form, as provided in Rule 5(d).

/s/ STERLING CARR,
Attorney for Plaintiffs.

Entered in Civil Docket Dec. 20, 1948.

[Endorsed]: Filed Dec. 18, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the above entitled Court, and to the Clerk thereof,
and to defendants in the above entitled action,
and to their, and each of their respective Counsel:

Notice is hereby given that plaintiffs above named hereby appeal to the United States Court of Appeals for the Ninth Circuit and from the order and judgment made and entered herein on the 22nd day of November, 1948, granting the motions of defendants herein to dismiss the complaint of plaintiffs herein for failure to state a claim upon which relief may be granted, and further from the order made and entered herein on December 17, 1948, denying the motion of plaintiffs to amend said order and judg-

ment entered herein on November 22, 1948, and further from the so-called judgment made and entered herein upon the 20th day of December, 1948, and reading in part as follows, to wit:

“It Is Hereby Ordered, Adjudged and Decreed that the action herein be and it is hereby dismissed against each and all of the defendants, with prejudice, with costs to defendants, and that plaintiffs take nothing by their action.”

Dated December 20, 1948.

/s/ THURMAN ARNOLD,

/s/ STERLING CARR,

Attorneys for Plaintiffs.

The names and addresses of the attorneys for the Defendants are as follows:

Ray J. Coleman, Esq., Coleman & McDonald, 1002 Quinby Building, Los Angeles 14, Calif.; Maurice E. Harrison, Esq., Moses Lasky, Esq., Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco 4, Calif. Attorneys for Defendants, Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, James M. Gerstley and Frank M. Jenifer.

Vincent H. O'Donnell, Esq., Mills Building, San Francisco 4, Calif., Attorney for Defendant, Stauffer Chemical Company.

John L. Reither, Esq., Central Bank Building, Oakland, California, Attorney for Defendant, West End Chemical Company.

Oliver & Donnally, Esqs., Fulton, Walter & Halley, Esqs., all of New York City, and in care of:

Charles A. Beardsley, Esq., 1516 Central Bank Bldg., Oakland 12, California; Charles A. Beardsley, Esq., 1516 Central Bank Bldg., Oakland 12, California, Attorneys for Defendant, American Potash & Chemical Corporation.

[Endorsed]: Filed Dec. 20, 1948.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, the Plaintiffs herein have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment made and entered herein November 22, 1948, and from the order denying motion to amend or alter judgment made and entered herein on December 17, 1948 and from the judgment made and entered herein on December 18, 1948 by the District Court of the United States for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, the undersigned, Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of Appellants that they will prosecute their appeal to effect and answer all costs if they fail to make good their appeal, not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount said Fidelity and Deposit

Company of Maryland acknowledges itself justly bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

Signed, Sealed and Dated this 20th day of December, 1948.

(Seal.)

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND,

By /s/ W. G. RISDON,
Attorney-in-Fact.

Attest:

/s/ G. KEHLENBECK,
Attesting Agent.

State of California,
City and County of San Francisco—ss.

On this 20th day of December, A. D. 1948, before me, Belle Jordan, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared W. G. Risdon, Attorney-in-Fact, and G. Kehlenbeck, Agent, of the Fidelity and Deposit Company of

Maryland, a corporation, known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent respectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-Fact and Agent respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

(Seal) /s/ BELLE JORDAN,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Nov. 9, 1952.

The premium charged for this bond is \$10.00 Dollars per annum.

[Endorsed]: Filed Dec. 20, 1948.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY ON AP-
PEAL

Now come Plaintiffs above named and, pursuant to the Federal Rules of Civil Procedure, set forth a statement of the points upon which appellants intend to rely upon appeal, as follows:

1. The District Court erred in granting the motions of appellees, above named, to dismiss the complaint of appellants as amended, and which order was filed herein upon the 22nd day of November, 1948.

2. The District Court erred in granting the motion of said appellees for a summary judgment, and which order was filed herein upon the 22nd of November, 1948.

3. The District Court erred in making its order filed herein on November 22, 1948 and dismissing the complaint of plaintiffs and appellants for failure to state a claim upon which relief may be granted.

4. The District Court erred in making its order denying the motion of plaintiffs and appellants to amend or alter the judgment entered herein, and which order denying said motion was filed herein on December 17, 1948.

5. The District Court erred in failing to deny the motions of defendants and appellees, and each of them, to dismiss and for summary judgment and filed herein by said appellees, and each of them.

6. The District Court erred in the following particulars:

In holding:

- (a) That this is an action at law.
- (b) That this is not a suit in equity.
- (c) That the State Statute of Limitations applies.
- (d) That the damages alleged are the gravamen of the action and not the conspiracy.
- (e) That the conspiracy charged upon is not the gravamen of the action.
- (f) That the Statute of Limitations runs from the date when the injury was inflicted and the damage suffered.
- (g) That the Statute of Limitations does not run from the last overt act performed pursuant to the conspiracy.
- (h) That fraud upon appellants was not shown on the face of the complaint.
- (i) That the allegations of the complaint, not specifically denied by appellees, were not admitted by them and, therefore, do not stand as admitted facts against them.
- (j) In failing to hold that upon this motion to dismiss and for summary judgment, the allegations of the complaint properly pleaded stand admitted by appellees.
- (k) That the Record establishes the fact that appellants knew, or had reason to believe, that the acts of appellees which caused the claimed damages were a violation of the Anti-Trust Laws.
- (l) That "belief" or "suspicion" on the part of appellants constituted discovery or knowledge.
- (m) That the complaint herein fails to allege af-

firmatively any injuries suffered by appellants by reason of appellees' violations of the Anti-Trust Laws.

(n) That in every transaction with appellees the appellants received consideration or any adjudication of their rights by a court having jurisdiction.

(o) That on the face of the complaint the price received by appellants does not appear to be inadequate consideration and further that the complaint fails to show affirmatively injuries to appellants' business or property for any of the transactions or events delineated.

(p) In failing to hold that the conspiracy charged was a continuing conspiracy.

(q) In failing to hold that the moratorium of 1942 and the extensions thereof tolled the statute of limitations pleaded by appellees.

(r) In failing to find that the cause of action alleged in the complaint, or some part thereof, was not barred by the Statute of Limitations.

(s) In failing to hold that the complaint on its face showed that appellees were guilty of fraud and the concealment thereof, against and from appellants.

7. The District Court erred in not granting appellants' motion to amend or alter the judgment ordered and/or entered herein upon the 22nd day of November, 1948, in the manner requested by appellants.

8. The District Court erred in granting judgment for appellees in accordance with the Judgment entered herein on the 20th day of December, 1948.

9. All of the points in the foregoing statement

apply to all, each and every of the appeals referred to in the Notice of Appeal heretofore filed by appellants herein on the 20th day of December, 1948.

Dated December 21, 1948.

/s/ THURMAN ARNOLD,

/s/ STERLING CARR,

Attorneys for Plaintiffs and Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 21, 1948.

[Title of District Court and Cause.]

DESIGNATION BY APPELLANTS OF
CONTENTS OF RECORD ON APPEAL

To the Clerk of the above entitled Court:

The plaintiffs above named, also appellants herein, respectfully request that the following portions of the record, proceedings and evidence be included and contained in the Record on Appeal, to wit:

1. Complaint, and amendments thereto, of appellants on file herein;
2. The motions of defendants and appellees herein, and each of them, to dismiss and for summary judgment and filed herein;
3. The order of the Court denominated "Memorandum Opinion", dated November 22, 1948 and filed herein upon said date, dismissing the complaint as amended and on file herein;
4. The judgment of dismissal entered herein upon the 22nd day of November, 1948;
5. The notice of motion of appellants to alter or

amend the judgment of dismissal entered herein upon November 22, 1948;

6. The order of the above entitled Court, dated December 17, 1948, denying the motion of appellants to amend or alter judgment and filed herein on said December 17, 1948;

7. The Judgment entered herein on the 20th day of December, 1948;

8. Notice of Appeal of appellants herein;

9. Statement of Points upon which appellants intend to rely on appeal;

10. This Designation of Contents of Record on Appeal.

Dated this 21st day of December, 1948.

/s/ THURMAN ARNOLD,

/s/ STERLING CARR,

Attorneys for Plaintiffs and Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 21, 1948.

[Title of District Court and Cause.]

COUNTER-DESIGNATION BY CERTAIN AP-
PELLEES OF CONTENTS OF RECORD ON
APPEAL PURSUANT TO RULE 75 OF THE
RULES OF CIVIL PROCEDURE

The appellees, Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, James M. Gerstley, Frank M. Jenifer, and Bank of America National Trust & Savings Association as Executor of the Last Will and Testament of

Clarence McAniffe Rasor, Deceased, each acting for itself, hereby designate the following portions of the record, proceedings and evidence, in addition to those designated by appellants, to be contained in the record on appeal taken by appellants on December 20, 1948:

1. "Affidavit of Moses Lasky in support of motions of defendants Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, James M. Gerstley, Frank M. Jenifer, and Bank of America National Trust & Savings Association as Executor of the Last Will and Testament of Clarence McAniffe Rasor to dismiss for failure to state a claim upon which relief may be granted, to dismiss because the action is barred by the Statute of Limitations, for a summary judgment, and to strike", said affidavit having been filed herein on February 2, 1948, together with Exhibits 1 to 15, inclusive, referred to in, part of, and filed with said affidavit.

2. Affidavit of Allen W. Ashburn filed herein on February 2, 1948, together with the attached copy of a certain "Affidavit of John K. Suckow".

3. Affidavit of Albert H. Bargion, filed herein on February 2, 1948.

4. Defendants' Exhibit A received in evidence on April 3, 1948 in support of defendants' motions to dismiss and for summary judgment consisting of the following:

- (a) Certified copy of "A petition for order to show cause why the trustee in bankruptcy should not execute and deliver a lease of the entire alleged bankrupt estate" and of "An amendment to a peti-

tion for order to show cause why the trustee in bankruptcy should not execute and deliver a lease of the entire alleged bankrupt estate" in certain proceedings in the District Court of the United States for the Southern District of California entitled "In the Matter of Suckow Borax Mines Consolidated, Inc., a corporation, Bankrupt, No. 16,938-H".

(b) Certified copy of original letter dated January 30, 1934 from William H. Neblett to the Honorable Harry Hollzer, Federal Building, Los Angeles.

(c) Affidavit of C. N. Olson.

5. The reporter's transcript of the proceedings of April 3, 7 and 13, 1948.

6. It is assumed that Item 1 in the "Designation by Appellants of contents of record on appeal" reading, "Complaint, and amendments thereto, of appellants on file herein", calls for the inclusion in the record of the "First amendment to complaint" filed herein on or about April 7, 1948 and also of "Second amendment to complaint" filed herein on or about April 26, 1948, but if not so included appellees hereby designate said "First amendment to complaint" and said "Second amendment to complaint".

7. It is assumed that Item 2 in said designation by appellants reading "The motions of defendants and appellees herein, and each of them, to dismiss and for summary judgment and filed herein" calls for the inclusion in the record of the "Notice of motions of defendants Pacific Coast Borax Company, Borax Consolidated, Ltd., United States Borax Company, Frank M. Jenifer and James M. Gerstley to

dismiss for failure to state a claim upon which relief may be granted, to dismiss because the action is barred by the Statute of Limitations, for a summary judgment, and to strike" filed on February 2, 1948, and also the "Notice of motions of Bank of America National Trust & Savings Association, as Executor of the Last Will and Testament of Clarence McAniffe Rasor, Deceased, to quash service of summons and to dismiss for improper venue, to dismiss for failure to state a claim upon which relief may be granted, to dismiss because the action is barred by the Statute of Limitations, and to strike" filed on the same day, but if not so included, appellees hereby designate each of said notices of motions.

8. This counter-designation.

Dated December 28, 1948.

/s/ RAY J. COLEMAN,
/s/ COLEMAN & McDONALD,
/s/ MAURICE E. HARRISON,
/s/ MOSES LASKY,
/s/ BROBECK, PHLEGER &
HARRISON,

Attorneys for Defendants Borax Consolidated, Ltd.,
Pacific Coast Borax Company, United States
Borax Company, F. M. Jenifer and James M.
Gerstley.

/s/ MAURICE E. HARRISON,
/s/ MOSES LASKY,
/s/ BROBECK, PHLEGER &
HARRISON,

Attorneys for Defendant Bank of America National Trust & Savings Association as Executor of the Last Will and Testament of Clarence McAniffe Rasor, Deceased.

[Endorsed]: Filed Dec. 29, 1948.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the parties.

Complaint.

First Amendment to Complaint.

Second Amendment to Complaint.

Affidavit of Allen W. Ashburn.

Affidavit of Albert H. Bargion.

Affidavit of Moses Lasky in Support of Certain Defendants to Dismiss, etc.

Exhibits 1 to 15, inclusive, Referred to in and Part of, Affidavit of Moses Lasky, etc.

Notice of Motions of Defendant, American Potash and Chemical Corporation, to Dismiss the Complaint, etc.

Notice of Motions of Bank of America National Trust and Saving Association, etc., to Quash Service of Summons and to Dismiss for Improper Venue, etc.

Notice of Motions of Defendants, Pacific Coast Borax Company, et al., to Dismiss for Failure to State a Claim, etc.

Notice of Motions of Defendant West End Chemical Company, a corporation, to Dismiss, etc.

Motions and Notice of Motions of Defendant Stauffer Chemical Company, to Dismiss, etc.

Substitution of Attorneys.

Affidavit of Paul O. Tobeler and 17 Exhibits.

Affidavit of Frank Buren in Opposition to Motions to Dismiss.

Affidavit of C. N. Olson—Defendant's Exhibit A.

Exhibit "A"—Copy of letter from A. W. Ashburn to William E. Colby.

Supplemental Affidavit of Frank Buren in Opposition to Motions to Dismiss.

Memorandum Opinion.

Notice of Motion to Alter or Amend Judgment of Dismissal Heretofore Entered Herein upon November 22, 1948.

Order Denying Motion to Amend or Alter Judgment.

Judgment.

Notice of Appeal.

Cost Bond on Appeal.

Statement of Points Upon Which Appellants Intend to Rely on Appeal.

Designation by Appellants of Contents of Record on Appeal.

Counter-Designation by Certain Appellees of Contents of Record on Appeal.

Two Volumes of Testimony.

In Witness Whereof, I have hereunto set my hand

affixed the seal of said District Court this 13th day of January, A. D. 1949.

(Seal)

C. W. CALBREATH,
Clerk.

In the Southern Division of the United States
District Court for the Northern District of
California

Before: Hon. Michael J. Roche, Judge.

No. 27646-R

SUCKOW BORAX MINES, CONSOLIDATED,
INC., a corporation; MOJAVE BORAX COM-
PANY, LTD., a corporation; PAUL O. TOBE-
LER, Executor of the Last Will and Testament
of John K. Suckow, Deceased, and RUTH E.
SUCKOW,

Plaintiffs,

vs.

BORAX CONSOLIDATED, LTD., a corporation,
et al.,

Defendants.

REPORTER'S TRANSCRIPT

Saturday, April 3, 1948,

10:00 o'clock a.m.

Appearances: For Plaintiffs: Sterling Carr, Esq.
For Defendants: Borax Consolidated, Ltd., Pacific
Coast Borax Company, United States Borax Com-
pany, Frank M. Jenifer, James M. Gerstley, Messrs.
Brobeck, Phleger & Harrison, by Maurice E. Harri-
son, Esq., and Moses Lasky, Esq., and Ray J. Cole-

man, Esq. [1 *] For Defendant American Potash & Chemical Corporation: Charles A. Beardsley, Esq., Joseph Burns, Esq., Michael McCarthy, Esq. For Defendant Bank of America National Trust & Savings Association as Executor of the Estate of Clarence M. Rasor: Messrs. Brobeck, Phleger & Harrison, by Moses Lasky, Esq. For Defendant West End Chemical Company: John L. Reith, Esq. For Stauffer Chemical Company: Vincent O'Donnell, Esq.

Mr. Lasky: If your Honor please, there are five groups of defendants and five groups of attorneys. In order to simplify the matter we have consulted together, divided up the argument, and had arranged that Mr. Joseph Burns, from New York, would proceed first. So, to take care of that situation, I have been asked to make a very short preliminary statement of two or three minutes in order to outline what our division was, what the issues are, and who would discuss what issue.

The Court: Very well. With that understanding you may proceed.

Mr. Lasky: There are five groups of defendants here. The first group, Borax Consolidated, Pacific Coast Borax [2] Company, United States Borax Company, Frank M. Jenifer, James A. Gerstley—that group is represented by Brobeck, Phleger & Harrison, Mr. Harrison, myself, and Mr. Coleman from Los Angeles.

The next group is the American Potash & Chemical Corporation, represented by Mr. Joseph Burns, from New York, and Mr. Michael McCarthy, and Mr.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

Burns will present the argument on their behalf.

The third group is the Bank of America National Trust & Savings Association, as the executor of the Estate of Clarence Rasor, and I will present argument on behalf of that defendant.

West End Chemical Company is represented by Mr. John Reith, of Oakland, and the Stauffer Chemical Company is represented by Mr. Vincent O'Donnell in this city.

Each one of these groups of defendants has filed a motion to dismiss, a motion for summary judgment, and certain other motions.

The Bank of America, as Executor of the Estate of Rasor, has also filed a motion with respect to venue.

* * * *

[3]

The division of the argument we have made for the convenience of the Court and everyone else is that Mr. Burns will proceed first to discuss the fact that the complaint is barred by the statute of limitations on its face. After Mr. Burns has presented that, Mr. Maurice Harrison, in due course, will present the matter that the complaint is barred by the statute of limitations with respect to our motions for summary judgment, and in that connection will call your Honor's attention to the undisputed documents that we have brought before the Court.

Subsequent to Mr. Harrison's presentation, I shall present to the Court on the basis of the motion for summary judgment, and on the basis of the complaint, itself, the matter of releases, and will point out that there were several sets of releases given here, and that the plaintiff has received considera-

tion therefor totaling something in the neighborhood of \$1,000,000.

I shall also point out that with respect to certain parts of the complaint no cause of action has even been remotely stated. Later I shall present, if time permits, a brief motion on behalf of Rasor's Estate. No cause of action whatever is stated against Rasor.

Mr. Reith will then present the matter on behalf of West [5] End, in so far as there are any peculiarities with respect to his client that differ his case from that of the others whose case will already have been presented, and then Mr. Vincent O'Donnell will speak on behalf of the Stauffer Chemical Company.

* * * *

[6]

Mr. Harrison: I am afraid, if the Court please, I have been talking rather hurriedly, but I wanted to present this matter as concisely as I could. The facts that I have outlined serve to show that throughout these earlier years the plaintiffs were completely conscious of the fact that they were being injured by the precise conspiracy and the precise acts that they now allege, and that they knew the facts as fully then as they do now.

Now, Mr. Carr has offered an affidavit in reply, not questioning any of the facts that we set forth, but setting up certain new matter. Certain of the matters he set forth in his affidavit have no relation whatever to the defense of the statute of limitations, but bear only upon the merits of the case, if the merits should ever be reached; and the affidavit is upon information and belief and is not admissible.

Before these proceedings conclude, we shall move to strike out the affidavit on that ground.

But he also set forth two items of evidence which he relies upon as showing that during these proceedings we denied violation of the Anti-Trust Laws; and those two items are, in the first place, a letter to Judge Hollzer from Mr. Ashburn representing our clients, in which he said we were not monopolizing the borax trade. And in the second place, of an answer in the bankruptcy proceedings in which we denied that we were guilty of monopoly. [57]

In respect to those matters, we desire to offer at this time and by way of rebuttal, a certified copy of proceedings before the bankruptcy court in the form of an affidavit by the court reporter showing that after those papers were filed, Mr. Neblett, as the attorney for the Suckow Company, reasserted his claim and his belief, and the belief of the plaintiff company, that we had been guilty of violation of the Anti-Trust Law and were injuring these plaintiffs by our conduct in that regard; and also a petition for order to show cause in the bankruptcy proceedings made after the statements in which the same claims are represented. And finally, a letter from Mr. Neblett to Judge Hollzer reasserting the claim, showing that although the accusation was denied—and after the accusation was denied—the Suckow Company reasserted its claim that it was being damaged by a violation of the Anti-Trust Laws. We handed copies of those to Mr. Carr.

Mr. Carr: Now, these are all put in as one exhibit?

Mr. Harrison: We will offer them as one exhibit.

The Clerk: Defendant's Exhibit A.

The Court: It may be marked.

(Documents referred to above, copy of bankruptcy proceedings, petition and letter were received in evidence and marked Defendant's Exhibit A.)

[Printer's Note]: Defendant's Exhibit A is set out in full at page 573 of this Printed Record.

* * * *

[58]

The Court: I think we can go on with this case on Wednesday at 10:00 o'clock. There was a trial scheduled to go on but we learn now that it will not go, so we will take the matter up Wednesday at 10:00 o'clock, if that is agreeable with everyone.

Mr. Lasky: Yes, your Honor.

Mr. Beardsley: Will the entire day be available for that?

The Court: Yes.

(Whereupon further proceedings were continued until 10:00 o'clock a.m., Wednesday, April 7, 1948.) [63]

Wednesday, April 7, 1948, 10:00 o'clock a.m.

The Clerk: Suckow v. Borax Consolidated.

Mr. Carr: Ready.

Mr. Harrison: Ready.

Mr. Carr: At this time, may it please the Court, we desire to file an amendment to the complaint, one paragraph of the complaint, and to file a counter-affidavit of Mr. Tobeler. I would like to have the record show that copies of that have been served on counsel in Court.

Mr. Lasky: They have been served, yes. I think, then, we should have a stipulation that our motions which have been addressed to the original complaint and have been partially argued should also be deemed addressed to your complaint as amended.

Mr. Carr: That is the law and I so stipulate.

* * * *

[64]

By Mr. Lasky (on behalf of defendants):

If your Honor please, from those reasons we submit not only that the case is barred by the statute of limitations, we submit it is clearly barred by the releases, and summary judgment or dismissal should be entered on behalf of the defendants.

At this point, on behalf of all the defendants, I would like to make a motion to strike the affidavit that Mr. Carr filed here last week, the affidavit of Paul O. Tobeler in reply to motions to dismiss, and for summary judgment. This affidavit starts out stating that Mr. Tobeler is the Secretary of Suckow Company and then says:

“Affiant is informed and believes and alleges as follows—”

And then we have page after page of information and belief. Rule 56 of the Rules of Civil Procedure has this to say concerning the form of affidavits on motion for summary judgment:

“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein.”

This affidavit of Tobeler does not comply with that, at all. It is loaded with hearsay. It has attached to it, if your Honor please, what supports to be a document filed in Court by our clients in the bankruptcy proceedings. That is [89] Exhibit 6. We do not move to strike that document. We have checked it. We have compared it, and although it is not a certified copy, it appears to be an accurate document and we accept it. But all the other documents in this case—some we have checked and they are erroneous. For example, counsel has a letter purportedly written by Judge Ashburn to Attorney William Colby in this city, in which he says that Ashburn did not think he had a good cause of action. We have checked that letter, and Ashburn said he thought he had a very good cause of action. Words have been taken out and words substituted. We do not know whether that change was inadvertent or intentional, but it points out why we cannot accept an information and belief affidavit.

The documents that we have laid before the Court have been certified. In my own affidavit I have attached photostats of the original papers. We have the originals here in Court ready to substitute them if counsel doubts their authenticity, but this affidavit of Mr. Carr's contains these uncertified documents. We have the affidavit of Mr. Tobeler, who could not possibly know anything about what he is saying, and he has attached a lot of unverified, uncertified, documents, which he obtained God knows where.

* * * *

[90]

By Mr. Carr (on behalf of plaintiffs):

Some comment was made by Mr. Lasky as to an

erroneous insertion of a word in Mr. Tobeler's affidavit. Unfortunately we find that to be true, and that the word "very" should be "no". How that happened I do not know. During the noon hour Mr. Tobeler and Mr. Buren examined the record here in Court and found that to be true. But that, however, is of no material moment. We did not attach that affidavit for the purpose of that particular allegation, but particularly to show that they wanted to use this equity suit, their intent of using this equity suit was to worry and harass Dr. Suckow and to put him in a good frame of mind from the defendants' standpoint to be dealt with when Mr. Baker, the head of the B.C.L. in London, came here to interview him in accordance [127] with the prior arrangement. They wanted to get him softened up, as it were. That was the purpose of that particular affidavit.

I will hurry along as fast as I can. We claim that the statute was tolled here, that due to the fraud and concealment the statute was tolled, and thereby the case comes under the Holmberg case, an equity case, to which the State statute had no application whatsoever, and instead the case was to be handled upon the doctrine of laches, if there was any delay at all, and we content the plaintiffs had no knowledge of this 1929 conspiracy, and not one bit of the evidence offered under this particular motion shows any knowledge or indication that the 1929 conspiracy had been formed.

Of course, plaintiff knew what was happening to them. They knew when these people were attempting to destroy the property, the mine: they knew these

various things were happening to them. But they did not know that this was the result of this 1929 conspiracy. Every one of these overt acts, as a matter of fact, constituted a conspiracy upon which plaintiffs could sue independently had they so elected to do, but they did not so elect, and when they found that the 1929 conspiracy had actually been formed in secret here and then concealed from them, then they brought this present action, and that was their right.

* * * *

[128]

In the complaint we allege at the time these releases were made we knew nothing of the claim under the 1929 conspiracy, and had the plaintiffs known of it, they never would have made these releases. That is admitted for purposes of this motion. Those allegations among all the others of the complaint are admitted. Therefore that can have no particular moment in this matter, those releases. And furthermore, the releases are not relied on here. There is no attempt to set aside the releases. [141] The releases are charged as an overt act pursuant to the conspiracy as to getting these releases from Dr. Suckow and his associates; that was one step in the conspiracy of 1929, and when they got the one in 1934, they thought they had accomplished some purpose, but unfortunately for them the doctor still owned a half interest in very valuable properties and they went on then and it became necessary for them and the crime was to exclude them, to get that very wealthy and very important area from them by any means upon which they could lay their hands. So that was accomplished in that manner.

We do not attempt to set the releases aside in this particular proceeding. This is not an action for that purpose. This is an action to recover damages for their wrong in doing in the manner in which they did through the conspiracy of 1929. So all of these contentions made by counsel in these allegations as to these releases have no moment on this particular action because, as I said, we are not attempting to set aside those releases. We are relying on them, to the contrary, as overt acts under the general conspiracy.

* * * *

[142]

As to the affidavit of Mr. Tobeler, Mr. Lasky on behalf of all the defendants, as I understood it, made a motion to strike it out because some of it was made on information and belief and other parts presented documents which were not certified as referred to in the rule.

Mr. Lasky: Pardon me. It is all on information and belief.

Mr. Carr: No, it is not all on information and belief. That is it exactly. There are certain parts of the affidavit on information and belief.

Mr. Lasky: Look at page 1, line 32. [157]

Mr. Carr: That is right. "The affiant is informed and alleges as follows," and then it goes on naming those things which are stated on information and belief, and it goes down to and including subparagraph 8 on page 7, and then we leave that information and belief and we go on to the statement,

"That among the files and records of the action and indictment commenced and secured by the United States Government against Borax Consoli-

dated and others and referred to in paragraph 89, page 60, of the complaint herein, there is on file a copy of a letter dated March 12, 1930, from said A. W. Ashburn, of the legal firm of Newlin and Ashburn, Esqs., one of the attorneys for B.C.L. and P.C.B., addressed to Mr. William E. Colby, Mills Building, San Francisco, California; that affiant is informed and believes that the original of said letter was introduced in said proceeding and was subsequently impounded by order of the Court in which said proceedings were pending.”

That is immaterial. If counsel insists on that coming out, we are perfectly willing to take that out.

“* * * But that a copy thereof now remains in said files; that a copy of said letter is hereunto annexed, marked Exhibit 3, and made a part hereof; that the ‘bill’ referred to in said Ashburn letter was the bill in equity referred to in Action No. C-107-M on page 26 of the brief on behalf of defendant B.C.L. and others filed herein in [158] support of said motion for summary judgment.”

There is no information and belief except it was introduced in evidence. We would be perfectly willing to withdraw that, and in this respect let me call your Honor’s attention at this time to these facts: When we prepared this affidavit we were advised of the particular rule. We did not believe, however, counsel would be so very technical as they are and have proven to be in so far as this is concerned because not one denial of any one of these exhibits or these allegations in this complaint has been made on this hearing. They are all matters within the knowledge of the defendant, and this is a responsive

affidavit. As said in the case of Wittlin v. Giacalone, 154 Fed. 2d. 20, from the United States Court of Appeals, District of Columbia,

“We are impelled to that conclusion because it is well established that one who moves for summary judgment has the burden of demonstrating clearly that the absence of any genuine issue of fact, and that any doubt as to the existence of such an issue is resolved against the movant. The courts are quite critical of the papers presented by the moving party, but not of the opposing papers. Indeed, Professor Moore says in his work on Federal Practice Under the New Federal Rules:

“ ‘Even if the pleading of the party opposing the motion is defective and does not state a sufficient claim [159] or defense, the motion will be denied, if the opposing papers show a genuine issue of fact.’ ”

As they do here.

Then there was the case of Dickheiser v. Pennsylvania Railroad, 5 Fed. Rules Decisions, affirmed in 155 Fed. 2d. 266, certiorari denied by the Supreme Court; on page 9 the Court said:

“Rule 56(e), 28 U.S.C.A., following Section 723 (c), provides inter alia, as follows: ‘Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter that is stated therein.’ The rule requires that affidavits in support of a motion for summary judgment must contain evidence which would be admissible as testimony at trial. Seward v. Nissen, D.C. 2 F.R.D. 545.

There is no requirement, however, that every statement in the affidavit must meet this test. Where the affidavit includes both competent and incompetent evidence, the court should disregard the incompetent evidence but give full consideration to that which is competent. See *Banco de Espana v. Federal Reserve Bank of New York*, 2 Cir. 114 Fed. 2d. 438. This is nothing more than the procedure which would be followed at trial. The court would not strike the entire testimony of a witness merely because a [160] portion of his testimony is incompetent. The same rule is to be applied to supporting affidavits.

“Accordingly, the motion to expunge or strike the supporting affidavits is denied.”

So we say we do not as to either the Colby—

Mr. Lasky: How could Mr. Tobeler be competent to testify as to letters that passed between other parties? He is not competent to testify to a thing that appears in his affidavit.

Mr. Carr: He is competent. You have not denied it. You have admitted it. You have not denied their existence and we challenge you now to deny them. They are actual letters that have been introduced in these criminal proceedings and hence they went there.

Mr. Lasky: They were not.

Mr. Carr: They were filed in the criminal proceedings. You were very careful, I will admit, in the criminal proceedings not to get any evidence in, so your plea of *nolo contendere* would be of no moment. It could not be made. He is competent. How does anybody know of anything except that it actually exists, and you do not deny that Ashburn wrote that

letter to Mr. Colby, and it stands of record here. So he would be competent to testify to it in this particular matter under those decisions which I just read to His Honor, that is, the Colby letter, and we ask your Honor, without taking your Honor's time now, unless you desire to hear it, to refer to it. The main [161] thing that we desire to call your Honor's attention in that particular letter—we are very sorry, your Honor. I do not know how that happened, neither does Mr. Tobeler, but we are having a certified copy of that letter that was filed in that criminal proceeding made, and we would ask that that be substituted, a certified copy, in place of the letter which appears in the affidavit. This is the part we were after:

“Mr. Baker and Mr. Zabriskie will be in San Francisco on one of their customary visits about the first of April. Mr. Baker has it in mind to have a conference of some kind with Suckow at that time and it seems to me that if we should file our suit and have our application for the temporary injunction so noticed that it would be returnable a few days after Mr. Baker's arrival, the stage would be very nicely set for an advantageous conference.”

This is not on information and belief:

“That on pages 26 to 35 of said brief of defendant Borax Consolidated, Ltd., et al., reference is made to an action in the District Court for the Southern District of California commonly known as the ‘equity action’ and numbered C-107-M. Many quotations appear in such brief from various pleadings in said action filed herein by said Suckow and said Suckow Company in which defendant Borax Consolidated

and others were charged with forming a conspiracy and combination to ruin said Suckow. [162]

“That in said action and under date of January 31, 1934, A. W. Ashburn of the firm of Newlin and Ashburn, Esqs., Attorneys-at-Law in Los Angeles, California, and representing said Borax Consolidated, Ltd., in said action addressed a letter to The Hon. Harry A. Hollzer, Judge of the United States District Court, Federal Building, Los Angeles, California, a copy of which is hereunto annexed, marked Exhibit 4, and made a part hereof. Affiant requests that this court note that in the second paragraph of such letter, said Ashburn denies that plaintiff therein is a monopoly in any sense of the word, and then goes on to state that defendant American Potash and Chemical Company is a competitor of said plaintiff. As a matter of fact, said American Potash and Chemical Company was at said time and ever since said agreement of 1929 a party to said agreement of 1929 and all continuing agreements thereof; every effort is made in said letter to place upon said American Potash and Chemical Company the onus of price cuts and competition.”

That letter is also uncertified, your Honor, and I would like to plead here that if counsel still insists on this certification or their motion in so far as this is concerned, that we be given permission to secure a certified copy of that letter and file herewith in the place and stead of this one here. [163]

Mr. Lasky: Is that the letter to Judge Hollzer that you are referring to?

Mr. Carr: Yes.

Mr. Lasky: This morning I made a statement

about a copy of a pleading that you have in there. I said we would not insist on that being certified. We will say the same about this letter to Judge Hollzer.

Mr. Carr: Then you will not require certification?

Mr. Lasky: Not of this particular document.

Mr. Carr: You will allow this letter from Ashburn to Judge Hollzer to stand? You won't insist on your motion so far as that letter is concerned?

Mr. Lasky: So far as that letter is concerned, no.

Mr. Carr: This is not either on information and belief:

“That on page 35, subdivision (6) of said brief on behalf of said British defendants, reference is made to the Senate investigating committee, and on page 37 it is stated that Senator Hebert read a statement by Thomas McManus, first receiver in bankruptcy of the Suckow Company, quoting various portions of said report; that a full copy of said report was hereunto annexed, marked Exhibit 5, and made a part hereof, and from which it will be seen that said Thomas McManus in stating his belief that a conspiracy had been formed by certain of the defendants referred to the conspiracy to institute and carry on said bankruptcy proceeding; [164] it will also be noted that no reference of any kind whatsoever to the 1929 conspiracy was made by Mr. McManus.”

Will you stipulate as to that, or rather, would you withdraw your objection as to that, inasmuch as you know whether it is true or not? If you do not stipu-

late, we will ask that the Court be kind enough to give us an opportunity to produce a certified copy in lieu of this.

Mr. Lasky: We do not know anything about that.

Mr. Carr: You have copies of that McManus report. You refer to it in your brief and made mention of it in support of your general statement that we knew of your conspiracies and wickedness.

Mr. Lasky: We quote portions that were read into the Senate committee's transcript.

Mr. Carr: We will submit that to the Court, and if the Court decides you are right in that situation, we will respectfully ask the Court to give us the opportunity to reply as provided in Rule 36. We could even take depositions on Rule 36. What do you want to do? You know whether that McManus report is right or not and yet you insist on certified copies.

Mr. O'Donnell: The difficulty is a lot of it is here-say. It befogs the issue.

Mr. Carr: The difficulty is you have all raised it and quoted from this same report. [165]

Mr. Lasky: Counsel, that report was not filed. We know nothing about it. What we brought before the Court were statements made by Suckow and Suckow's attorney.

Mr. Carr: You quote in your brief a statement by Mr. McManus.

Mr. Lasky: In the presence of Mr. Buren and Suckow.

Mr. Carr: Yes, but you state he made it and you must know all about it. Why be technical about the thing?

Mr. Harrison: This is not part of the Senate investigating committee report.

Mr. Lasky: Not the report, no.

Mr. Carr: To rely on that matter you must bring in all the Senate investigating committee report. You can't pick out what you want and not produce the whole.

Mr. Harrison: We offer the full report of the Senate investigating committee.

Mr. Carr: I do not think it is a full report, Mr. Harrison, so far as I can find out. It may be, but so far as I can find out, there was so much of this, for example, on page 36,

“Mr. Laugharn, trustee in bankruptcy of the Suckow Company, stated that Borax Consolidated, Ltd., and Pacific Coast Borax Company were a monopoly. Senator Hebert read a statement by Thomas McManus, first receiver in bankruptcy of the Suckow Company, that the Pacific Coast Borax Company had launched a campaign of persecution against [166] Suckow and dragged him through bankruptcy, and that:

“‘As an indication of the length to which the Pacific Company was prepared to go in its determination to throttle and kill all competition,’ ”—this is McManus’ testimony which they are quoting—“ ‘the author of this report was informed by Mr. Jenifer, vice-president and general manager of the Pacific Company, that this concern had offered Dr. Suckow an independent income for life on the condition that he would not attempt to develop the borax lands in which he owns a one-half undivided interest.’

“Thomas McManus, under questioning by Mr. Neblett, testified”—and you quoted. Now, all I want

from you, Mr. Lasky, and also I presume Mr. Harrison, is a statement of whether you are going to insist that we get this McManus report certified.

Mr. Lasky: Where are you going to get it certified?

Mr. Carr: It is filed with the Senate committee.

Mr. Harrison: We obtained a certified copy of the full proceedings. That is one of the exhibits in Mr. Lasky's affidavit. We did not find that, Mr. Carr. I do not know where you obtained that.

Mr. Carr: It is out of your brief.

Mr. Harrison: That, but not what you have in your affidavit.

Mr. Carr: Certainly. [167]

Mr. Harrison: If you will examine the transcript of the hearings of the investigating committee which we have put in evidence, you will find that that report was not admitted in evidence before the committee. All that we know about it is what appears from the testimony that is before this Court.

Mr. Carr: Yes, but you quoted. If you quote part of it, you have to quote the whole.

Mr. Harrison: Mr. Carr, if you wished the whole of which we had offered part, you would be quite right. But we have offered the full proceedings of the committee certified. If you have any proceedings of the committee certified, it is your privilege to offer them.

Mr. Carr: No, we haven't, but we will get this one. Am I correct in that, Mr. Tobeler?

Mr. Tobeler: I am under the impression that this is from the record of the Senate committee.

Mr. Buren: I was present and heard, but I don't

remember that that particular report was filed with the committee.

Mr. Carr: If you insist, we will endeavor to secure, provided your Honor will permit us to do so, a certified copy and substitute it for this copy which is attached here.

Mr. Lasky: Counsel, is the Mr. Buren who just spoke the Mr. Buren who is referred to in our brief as the secretary and attorney of the Suckow Company?

Mr. Carr: Yes. [168]

Mr. Lasky: So his statement now that he was present at the Senate committee and heard all these things is the statement of that Mr. Buren?

Mr. Carr: Yes.

Mr. Lasky: Fine. I would like the record to show that.

Mr. Carr: And he said he does not know whether it was filed in the Senate committee or not, but we ask your Honor if counsel insist on it, that we be given an opportunity to endeavor to present a certified copy of that.

The Court: I do not want to preclude you from further time. It is now 4:30. If you want further time, you can have it. When does the calendar permit this matter to be heard again?

The Clerk: We have trials for the rest of the week and next week. This was just an accident that today was open.

The Court: What is on Monday afternoon?

The Clerk: Just the law and motion calendar.

The Court: I will give them Monday afternoon.

Mr. Carr: Thank you, your Honor. You are very kind.

The Court: Maybe this will be helpful. An action in Judge Goodman's Court was referred to. I know nothing about it at all. I know nothing of what took place. I will have counsel on both sides advise the Court just what happened.

Mr. Harrison: The same counsel appeared in that case.

The Court: You may outline it, and then if there is any [169] additional matter you want to call to the Court's attention, you may do so. The thing I have in mind is the statute of limitations, and it may or may not become an important or vital question in this case. I just want to know about it for my own information.

Mr. Carr: It is a different question.

Mr. Harrison: We consider it is the same.

Mr. Carr: I haven't any of my papers concerning that matter.

Mr. Harrison: Do you want that now or Monday?

The Court: I thought if I gave you my state of mind on these matters it would be helpful.

Mr. Carr: We appreciate that. Do you wish to hear that now or Monday?

The Court: Any time you wish.

Mr. Carr: I would rather have it Monday.

The Court: Monday at 2:00 o'clock.

Mr. Harrison: Yes, your Honor. We would like to ask your Honor at that time for an opportunity to reply in writing to counsel's last brief, which only came in a few days before the last hearing.

The Court: Certainly, but I am sure you will be able to do that without difficulty.

Mr. Lasky: May I call the Court's attention to the fact that the Senate investigating transcript we are putting in the [170] record shows that the document counsel has been talking about was not received in the record. It is not part of the Senate committee proceedings, Col. Neblett saying, "We can not let that go into the record. It is too wrong." So the document he is talking about was never made part of that record.

The Court: I think between now and 2:00 o'clock Monday you may be able to persuade counsel of your position. Of course, if it did not go in, we are not concerned with it.

Mr. Carr: Except the reference made to the brief.

The Court: I understand. Monday at 2:00.

(Thereupon an adjournment was taken until Monday, April 12, 1948, at 2:00 o'clock p.m.)

Tuesday, April 13, 1948, 10:00 o'clock a.m.

The Clerk: Suckow vs. Borax Consolidated.

Mr. Carr: Ready.

Mr. Harrison: Ready.

Mr. Carr: May it please your Honor, at this time I would like to present Mr. Frank Buren, a member of the bar of California, and a resident of Los Angeles, who will become associated with me in this case from now on, and I would like to ask his admission into this court for the purpose of this trial.

The Court: You may be sworn.

(Mr. Frank Buren was sworn.) [172]

Mr. Carr: I will hurry along, your Honor. When we adjourned the other afternoon we were discussing the affidavit of Mr. Tobeler, and some of that affidavit is on information and belief, and, counsel, I would like to ask, do you intend to urge those objections to strike? [181]

Mr. Harrison: We do, except as to those matters which are matters of court record. We do not intend to urge it to papers filed in court, Mr. Carr. Otherwise, we do.

Mr. Carr: The next one in this affidavit is the reference to the equity case. That is filed in court and there is no objection to that.

The next one alleged in Mr. Tobeler's affidavit is the McManus report.

Then the next one is the answer of defendant Borax Consolidated, a copy of which is attached. Now, do you insist upon the certification of those?

Mr. Harrison: Not that answer. No paper filed in court, Mr. Carr.

Mr. Carr: Page 9:

"That affiant is informed and believes and therefore alleges as to a telegram sent——"

We seek permission to withdraw the words "is informed and believes."

Mr. Harrison: What is that?

Mr. Carr: We ask leave to amend the affidavit by withdrawing the words on line 27, page 9: "That

affiant is informed and believes," and so it will read, "That therefore."

Mr. Harrison: We submit, if the Court please, that a person's affidavit cannot be amended to strike out that he is informed and believes to make it a positive affidavit. [182]

Mr. Carr: Why not?

Mr. Harrison: A person making oath as to a document——

The Court: If he made an affidavit, he is entitled to it as is, the whole affidavit. It is not for me to put any construction on it, at this time at least.

Mr. Carr: If there is any objection to that exhibit 7, which is the cablegram——

Mr. Harrison: Yes.

Mr. Carr: Then if you object to these various things we are going to ask upon the conclusion of this hearing for an order permitting us to take the depositions to prove these particular things that you object to.

Mr. Harrison: Well, we will be heard on that motion.

Mr. Carr: The next one is Exhibit 9, which is a telegram from Mr. Gurney Newlin, a partner of Mr. Ashburn, to Mr. Baker, Managing Director of the BCL.

Mr. Harrison: We object to that.

Mr. Carr: We then will make reference to those

in our motion. We will take the deposition of Mr. Newlin and have him produce the wire and also the Gerstley letters.

Mr. Harrison: We object to that on the ground it is immaterial.

Mr. Carr: We will ask to take the deposition of Gerstley. We do not care about that next one. This one under date of May 5, Exhibit 13, is not on information and belief. [183]

“Affiant is informed and believes that Emden should be paid the sum of \$10,000.”

We will withdraw for whatever it is worth, “is informed and believes and therefore alleges.”

Mr. Harrison: Are you turning that into a positive affidavit?

Mr. Carr: Yes.

Mr. Harrison: We will object to that, if the Court please.

Mr. Carr: We will ask his Honor to rule on that. The next one refers to the indictment here in court:

“Is informed and believes and therefore alleges——”

Mr. Harrison: You are not asking the court to consider that?

Mr. Carr: No, that is out. We will withdraw that.

Now, as to the affidavit of Razor in the equity

case, only a part of his affidavit is attached, and, of course, you are legally under those authorities which were cited entitled to the whole affidavit if you want, but you have it all in your possession.

Mr. Harrison: If you will produce that affidavit.

Mr. Carr: The original?

Mr. Harrison: Or a copy of it.

Mr. Carr: All right.

Mr. Harrison: We won't make any question about anything that was filed in court. [184]

Mr. Carr: I think we have that already. I have it, I think, in the file. You want a copy?

Mr. Harrison: Yes.

Mr. Carr: But you have a copy of it in your file.

Mr. Harrison: We may have, if you will tell me where it is.

Mr. Carr: As to the West End, we would like to withdraw on page 14, strike out from our affidavit, line 2, the words, "Is informed and believes and therefore alleges."

Mr. Reith: We join in the same objection.

Mr. Carr: The next one is Exhibit 14. That is on positive information.

Exhibit 16 you would object to?

Mr. Harrison: Yes.

Mr. Carr: That is that telegram.

The Court: Does it follow, then? What are we doing here? The motion to strike will be granted?

Mr. Harrison: Counsel is asking if we agree that any of these things will go in. We said we would not agree unless they were a part of court proceedings, and we are objecting to affidavits on

information and belief as to which the party has no personal knowledge.

The Court: He answered that by saying he will take the deposition.

Mr. Harrison: We would like to be heard on that, if the [185] court please.

Mr. Carr: At the conclusion of this and in due course we will make a regular motion for that to be heard. The same applies that applies to the other. That covers the affidavit and put us in a position where we know.

At this time we would like to file certified copy of the letter to Colby.

Mr. Harrison: What?

Mr. Carr: A certified copy. You will remember that was the one in which it was discovered that there was one wrong word.

Mr. Harrison: Yes, of course, if the Court please, the certified copy does not prove the letter. I do not think it adds anything. I mean that only because counsel seems to think, and he may urge it with respect to other papers, because a document has been impounded with the grand jury, that a certified copy is proof of the execution of a document. All the certification shows is that a document is on file with the clerk. As far as this letter is concerned, if the court please, I am not going to make any objection as to form. This is a letter between Mr. Ashburn and Mr. Colby. We do object to it on the ground it is immaterial and we will discuss that in our argument. [186]

The Court: You say you were secretary?

Mr. Buren: I was secretary of the Suckow Corporation. I was Dr. Suckow's personal attorney, and I also appeared as attorney for the Suckow Corporation. [194]

* * * *

The Court: I think with the consent of everybody with relation to this litigation it would be well to wait until we have the final determination of the Circuit Court in the Burnham case; wouldn't that be helpful? What is your thought on that? [229]

* * * *

Mr. Carr: I ask leave to file within ten days a memorandum on such questions of law.

The Court: And ten days to answer?

Mr. Harrison: We will have ten days to reply.

The Court: That will bring us to where?

The Clerk: May 5 on the calendar for submission.

The Court: May 5 on the calendar. [230]

Mr. Beardsley: Should we appear on May 5?

The Court: No, if all the briefs are in, the matter will stand submitted.

Mr. Carr: Thank you, Your Honor, for giving us all this time and inconveniencing Your Honor. You have been very courteous and kind and I am sure I speak for all counsel.

Mr. Harrison: Yes, indeed, Your Honor.

The Court: I hope you are all as satisfied when this case is disposed of as you are this morning.

CERTIFICATE OF REPORTER

I, J. J. Sweeney, Official Reporter, certify that the foregoing 59 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ J. J. SWEENEY.

[Endorsed]: Filed Apr. 13, 1948. [231]

[Endorsed]: No. 12158. United States Court of Appeals for the Ninth Circuit. Suckow Borax Mines Consolidated, Inc., a corporation, Mojave Borax Company, Ltd., a corporation, Paul O. Tobeler, Executor of the Last Will and Testament of John K. Suckow, Deceased, and Ruth E. Suckow, Appellants, vs. Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, American Potash & Chemical Corporation, Stauffer Chemical Company, West End Chemical Company, Western Borax Company, Ltd., Goldfields American Development Company, Pacific Alkali Company, F. Lesser, James M. Gerstley, Frank M. Jenifer, P. C. Baker, Allen W. Ashburn, Walter A. Moses, Bank of America National Trust and Savings Association as Executor of the Last Will and Testament of Clarence McAnisse Rasor, deceased, Ben H. Brown, as Special Administrator of the Estate of Victor C. Emden, Deceased, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 18, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12,158

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation, et al.,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., a corporation,
et al.,

Appellees.

STATEMENT OF POINTS TO BE RELIED
UPON BY APPELLANTS AND DESIGNA-
TION OF PARTS OF RECORD TO BE
PRINTED.

Appellants adopt as the statement of points upon which they intend to rely upon this Appeal, the Statement of Points filed by them in the above-entitled action in the United States District Court for the Northern District of California, Southern Division, upon December 21, 1948, and in addition thereto designate the following points:

10. All statutes of limitation urged by appellees herein were tolled by the Act of the 77th Congress, 2nd Session, Chapter 589, 56 Stat. 781 and adopted upon October 10, 1942, and which Act was subsequently and upon the 30th day of July, 1945, extended to the 30th day of July, 1946.

11. That if the said Moratorium Act referred to hereinabove did not apply to all of the damages

claimed and to the overt acts of appellees, all as alleged in the complaint on file herein, it did apply to the overt acts surrounding the sale of December, 1942, referred to in the complaint on file herein.

And appellants designate that there be printed the following parts of the Record now on file herein, to-wit:

Complaint.

First Amendment to Complaint.

Second Amendment to Complaint.

Affidavit of Paul O. Tobeler and 17 Exhibits.

Affidavit of Frank Buren in Opposition to Motion to Dismiss.

Supplemental Affidavit of Frank Buren in Opposition to Motions to Dismiss.

Memorandum Opinion.

Notice of Motion to Alter or Amend Judgment of Dismissal Heretofore Entered Herein upon November 22, 1948.

Order Denying Motion to Amend or Alter Judgment.

Judgment.

Notice of Appeal.

Cost Bond on Appeal.

Statement of Points Upon Which Appellants Intend to Rely on Appeal.

Designation by Appellants of Contents of Record on Appeal.

This Statement of Points and Designation.

/s/ THURMAN ARNOLD,

/s/ STERLING CARR,

Attorneys for Appellants.

(Affidavit of Service by Mail attached.)

(Acknowledgment of Service.)

[Endorsed]: Filed January 26, 1949. Paul P. O'Brien, Clerk.

—————

[Title of U. S. Court of Appeals and Cause.]

Counter-Designation of Appellee West End Chemical Company, a Corporation, of Parts of Record to be Printed.

Appellee, West End Chemical Company, a corporation, hereby designates the following parts of the record to be printed, in addition to parts designated by other parties:

1. Notice of motions of defendant West End Chemical Company, a corporation, to dismiss for failure to state a claim upon which relief may be granted, to dismiss because the action is barred by the Statute of Limitations, for a summary judgment, and to strike.

2. This Counter-Designation.

Dated: January 27, 1949.

/s/ JOHN L. REITH,

Attorney for Appellee West End Chemical Company, a corporation.

[Endorsed]: Filed January 28, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

Designation by Appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, James M. Gerstley, Frank M. Jenifer, Bank of America N.T.&S.A., etc., and American Potash & Chemical Corporation of Additional Parts of Record Deemed to be Material

Appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, James M. Gerstley, Frank M. Jenifer, Bank of America National Trust & Savings Association as Executor of the Last Will and Testament of Clarence McAniffe Rasor, Deceased, and American Potash & Chemical Corporation hereby designate the following portions of the record which they deem material to the consideration of the appeal and which they request to be printed, in addition to portions designated by appellants:

1. Notice of motions of defendants Pacific Coast Borax Company, Borax Consolidated, Ltd., United States Borax Company, Frank M. Jenifer and James

M. Gerstley to dismiss for failure to state a claim upon which relief may be granted, to dismiss because the action is barred by the statute of limitations, for a summary judgment, and to strike;

2. Notice of motions of Bank of America National Trust & Savings Association as Executor of the Last Will and Testament of Clarence McAniffe Rasor, Deceased, to quash service of summons and to dismiss for improper venue, to dismiss for failure to state a claim upon which relief may be granted, to dismiss because the action is barred by the statute of limitations, and to strike;

3. Notice of motions of defendant American Potash & Chemical Corporation to dismiss the complaint, for summary judgment, and to strike parts of the complaint;

4. The order of dismissal entered herein on or about the 22nd of November, 1948;

5. The judgment entered herein on or about the 20th of December, 1948;

6. Affidavit of Moses Lasky in support of motions of defendants Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, James M. Gerstley, Frank M. Jenifer and Bank of America National Trust & Savings Association as Executor of the Last Will and Testament of Clarence McAniffe Rasor to dismiss for failure to state a claim upon which relief may be granted, to dismiss because the action is barred by the statute of limitations, for a summary judgment, and to strike, together with Exhibits 1 to 15, inclusive, referred to in, part of, and filed with said affidavit but not including the following:

(a) In Exhibit 1 referred to in said affidavit there may be omitted the paragraphs numbered I, II, III, and paragraph V, and paragraphs VII, VIII, IX and X.

(b) In Exhibit 4 referred to in said affidavit there may be omitted the pages numbered 1, 2, the last 6 lines on page 3, the first 16 lines on page 4, the page numbered 927, the last 7 lines on the page numbered 949, the first 18 lines on the page numbered 950, the pages numbered 963, 964, the last 13 lines on page 965, all but lines 4 to 9, inclusive, on page 966, all but the last 10 lines on page 967, and the pages numbered 1011, 1012, 1013 and 1014.

(c) In Exhibit 7 referred to in said affidavit there may be omitted the paragraphs numbered I to XVI, inclusive, appearing on pages 1 to 11 of said exhibit, and there may also be omitted all of the paragraphs numbered I and II of the so-called Third and Separate Defense therein appearing at pages 19 and 20 of said exhibit.

(d) In Exhibit 11 referred to in said affidavit there may be omitted the documents attached to said exhibit and marked Exhibits F and G thereof, since said documents are forms of releases which were later executed and of which executed releases Exhibits 8, 9 and 10 attached to said affidavit of Moses Lasky are copies.

7. Affidavit of Allen W. Ashburn filed herein on February 2, 1948, together with the attached copies of a certain "Affidavit of John K. Suckow";

8. Affidavit of Albert H. Bargion;

9. Defendants' Exhibit A received in evidence on April 3, 1948 in support of defendants' motions to dismiss and for summary judgment, and all parts thereof;

10. The following portions of the Reporter's Transcript:

(a) Pages 1 and 2; page 3 through the word "venue" in line 19; page 5, line 4, to page 6, line 4;

(b) Page 57 and page 58 to and including line 23;

(c) Page 63, lines 3-13, inclusive;

(d) Page 64, lines 1-16, inclusive;

(e) Page 89, line 1, to page 90, line 20, with identification of these remarks as having been made by Mr. Lasky on behalf of defendants;

(f) Page 127, line 13, to page 128, line 24; page 141, line 18, to page 142, line 19; page 157, lines 15-19, with identification of all the foregoing remarks as having been made by Mr. Carr on behalf of plaintiff;

(g) Page 157, line 20, through page 171;

(h) Page 172, lines 1-13, inclusive;

(i) Page 181, line 21, to page 186, line 23;

(j) Page 194, lines 16-19, inclusive;

(k) Page 229, lines 9-13, inclusive;

(l) Page 230, line 19, through page 231.

11. Counter-designation of appellees Borax Consolidated, Ltd., et al. of contents of record on appeal filed on December 29, 1948;

12. This designation.

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[Endorsed]: Filed February 2, 1949. Paul P.
O'Brien, Clerk.

IN THE

United States
Court of Appeals

For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation; MOJAVE BORAX COM-
PANY, LTD., a corporation; PAUL O. TOBE-
LER, Executor of the Last Will and Testament
of John K. Suckow, Deceased, and RUTH E.
SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC
COAST BORAX COMPANY, UNITED
STATES BORAX COMPANY, AMERICAN
POTASH & CHEMICAL CORPORATION,
STAUFFER CHEMICAL COMPANY, WEST
END CHEMICAL COMPANY, WESTERN
BORAX COMPANY, LTD., GOLDFIELDS
AMERICAN DEVELOPMENT COMPANY,
PACIFIC ALKALI COMPANY, F. LESSER,
JAMES M. GERSTLEY, FRANK M. JENIFER,
P. C. BAKER, ALLEN W. ASHBURN, WAL-
TER A. MOSES, BANK OF AMERICA NA-
TIONAL TRUST AND SAVINGS ASSOCIA-
TION, as Executor of the Last Will and Testa-
ment of Clarence McAnisse Rasor, deceased, BEN
H. BROWN, as Special Administrator of the
Estate of Victor C. Emden, deceased, et al.,

Appellees.

OPENING BRIEF OF APPELLANTS

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Subject Index

| | Page |
|--|------|
| Jurisdiction | 2 |
| Statement of the Pleadings and Facts..... | 3 |
| The Bankruptcy Proceedings..... | 21 |
| Motions of Defendants to Dismiss and for Summary Judgment..... | 35 |
| Specification of Errors..... | 37 |
| Admissions of Appellees..... | 40 |
| Argument | 44 |
| I. | 44 |
| A. The Complaint Stated a Cause of Action for Violation of the Anti-Trust Law..... | 45 |
| B. The Motions Filed by Appellees and the Affidavits Accompanying the Same and Presented in Support Thereof Raise Questions of Fact Which Upon Becoming Apparent Required the Lower Court to Deny Such Motions and After the Filing of Answers by Appellees to Set the Cause for Trial Upon the Merits. Instead of so Ruling as Required by the Authorities Hereinafter Set Forth, the Lower Court Presumed to Rule and Pass Upon the Questions of Fact Raised by Such Affidavits Accompanying the Motions to Dismiss and the Complaint and Affidavits of Appellees..... | 48 |
| The Motions to Dismiss Admitted All of the Allegations of the Complaint Well Pleaded..... | 48 |
| II. The Conspiracy Is the Gravamen of a Treble Damage Action Such as the Present..... | 56 |
| III. In a Situation Such as the Present Where There Have Been Continuing Overt Acts, the Statute of Limitations Does Not Begin to Run Until the Performance of the Last Overt Act Performed Pursuant to the Conspiracy..... | 59 |
| IV. The Moratorium Act of 1942, and the Amendments Thereto, Tolloed the Statute of Limitations Until June 30, 1946 | 61 |

| | Page |
|---|------|
| V. The Conspiracy of 1929, Charged in the Complaint, Was a Continuing Conspiracy, and Neither the Statute of Limitations Nor the Application of Laches Commenced to Run Until the Completion of the Last Overt Act Performed Pursuant to Such Conspiracy, and Which Was the Settlement Agreement of December 1942..... | 63 |
| VI. The Fraud and Concealment of Appellees Set Forth in the Complaint and Admitted by Appellees Tolded the Statute of Limitations Until the Discovery by Appellants of Their Cause of Action Against Appellees and Which Discovery Was Made in September 1929, at the Time the Government Commenced Its Action and Secured Its Indictment Against Certain of the Appellees..... | 67 |
| VII. The Tolling of the Statute by Reason of Fraud and Concealment Is Applicable to Actions at Law as Well as Those in Equity | 74 |
| VIII. The Statute of Limitations Cannot Be Raised on a Motion to Dismiss | 79 |
| IX. The Question of the Two Releases of 1934 and 1942 Urged by Appellees Cannot Be Considered on the Motions to Dismiss and for Summary Judgment and Must Be Raised in an Affirmative Defense. Also, the Lower Court Erred in Considering and Passing Upon the Facts Presented by and Surrounding the Claimed Releases in Question..... | 82 |
| X. The Lower Court Erred in Denying Appellants' Motion for Permission to Amend Their Complaint..... | 84 |
| Conclusion | 87 |

Table of Authorities Cited

| CASES | Pages |
|---|-----------------------|
| Albert Pick-Barth Co. v. Mitchell, Etc., 57 F.2d 96 (Cert. denied, 286 U.S. 552; 52 S.Ct. 503)..... | 58 |
| American Surety Co. v. Pauly, 170 U.S. 133, 145..... | 73 |
| American Tobacco Co. v. Peoples Tobacco Co., 204 Fed. 58 (C.C.A. 5th) | 74, 75 |
| Ansehl v. Puritan, etc., 61 F.(2) 131 (8th Cir.)..... | 3, 48, 55 |
| Bailey v. Glover, 21 Wall. 342, 22 L.Ed. 637..... | 75, 76 |
| Bowles v. Glick Bros., Etc., 146 F.(2) 566 (9th Cir.)..... | 80 |
| Braverman v. United States, 125 Fed.2d 283, 287..... | 65 |
| Brown v. Elliott, 225 U.S. 392; 32 S.Ct. 812, 815, 819..... | 59, 60, 64, 65 |
| Carlisle v. Kelly Etc., 72 Fed. Supp. 326 (D.C. E.D. Penn.), (Subd. (1)) | 80 |
| Chattanooga Foundry, Etc. v. Atlanta, 203 U.S. 390; 27 S.Ct. 65.... | 58 |
| Detsch & Co. v. American Products Co., 152 F.(2) 473 (9th Cir.), Sub. 6 | 44, 52 |
| Dirk Ter Haar v. Seaboard, Etc., 1 F.R.D., p. 598 (S.D. Cal.)..... | 79, 80 |
| Domestic and Foreign Commerce Corp. v. Littlejohn, 165 F.(2) 235, at 237..... | 3, 48, 54 |
| Eliason v. Wilborn, 167 N.E. 101; affirmed 50 S.Ct. 382; 281 U.S. 547 | 68 |
| Fiswick v. United States, 329 U.S. 211; 67 S.Ct. 224 (p. 216 of the Official Report) | 59 |
| Fleishhacker v. Blum, 109 F.2d 543, 548..... | 69, 70 |
| Frederick Hart & Co. v. Recordgraph Corp., (3rd Cir.) 169 F.(2) 580 | 3, 48, 49, 50, 51, 83 |
| Hansen v. Bear Film Co., Inc., 28 Cal. 2d 154, Subs. 11 and 12.... | 70, 71 |
| Hedderly v. United States, 193 Fed. 561 (Ninth Circuit); at page 569 | 65 |
| Holmberg v. Armbrecht, 327 U.S. 392, 66 Sup. Ct., 582..... | 76, 77 |

| | Pages |
|---|------------|
| Jack, Etc. v. Associates, Etc., 125 F.(2) 778 (3 Cir.), (Subd. (14)) | 82 |
| Jordan v. Guerra, 23 Cal.(2d) 469..... | 84 |
| Kalruth v. Resort Properties, Ltd., 57 Cal. App. 2d, 146; 134 P.2d 513 | 70 |
| Kimball v. Pacific Gas & Electric Co., 220 Cal. 203; 30 P.2d, 39.. | 71 |
| Ledbetter v. Farmers, etc., 142 F.(2) 147, (4th Cir.), Cert. den., 323 U.S. 719..... | 3, 48, 55 |
| Louisiana Farmers, Etc. v. Great Atlantic, Etc., 131 F.(2) 419..... | 85 |
| Michel v. Meyer, 8 F.R.D. 464..... | 3, 48 |
| Nash v. United States, 229 U.S. 373; 33 S.Ct. 780..... | 56 |
| Newark Evening News v. King Features, 7 F.R.D., 645..... | 53, 54 |
| Pashley v. Pacific Elec. Ry. Co., 25 Cal. 2d, 226..... | 72 |
| Publicity Building, Etc. v. Hannegan, 139 F.(2) 583 (Eighth Cir.).. | 46, 47 |
| Purity Cheese Co. v. Frank Ryser Co., 153 F.(2), 88 (7th Cir.)..... | 3, 48 |
| Radio Corporation v. Raytheon Mfg. Co., 296 U.S. 459; 56 S.Ct. 297 | 84 |
| Raynale v. Yellow Cab Co., 115 Cal. App. 90; 300 Pac. 991..... | 84 |
| Rogers v. Girard Trust Co., 159 F.(2) 239 (6th Cir.)..... | 85, 86 |
| Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620, 64 S.Ct. 724 | 53 |
| Sprague v. Vogt, 150 F.(2) 795 (8th Cir.)..... | 44, 52, 53 |
| Stevens Co. v. Foster & Kleiser, Etc., 311 U.S. 255, 61 S.Ct. 210.... | 46 |
| United States v. Armour (10 Cir.), 137 F.2d, at p. 271..... | 58 |
| United States v. Frankfort, etc., 324 U.S. 293, 65 S.Ct. 661..... | 3, 48, 55 |
| United States v. General Motors, Etc., 121 F.2d (pp. 404 and 405) | 57 |
| United States v. Kissel, 218 U.S. 601, L.Ed. 1168..... | 63, 64, 66 |
| United States v. McWilliams, 54 Fed. Supp. 791, 794..... | 65 |
| United States v. New York, Etc. (5 Cir.), 137 F.2d 459; (Cert. denied, 320 U.S. 783)..... | 57 |
| United States v. Socony, Etc., 310 U.S. 150; 60 S.Ct. 811..... | 56 |
| United States v. Standard Oil, Etc., 7 F.R.D. 338 (S.D. Cal.)..... | 47 |

Pages

| | |
|--|-----------|
| Waugh v. Guthrie, Etc. Co., 37 Okla. 239; 131 Pac. 174, 178..... | 72, 73 |
| Willson v. Graphol Products Co., 165 F.(2) 446..... | 3, 48, 55 |

STATUTES

| | |
|---|--------|
| Anti-Trust Law, Title 15, Sections 1, 2..... | 45 |
| California Code of Civil Procedure, Sec. 338, Subdivisions 1, 4..... | 36 |
| Civil Code of California, Section 1542..... | 83, 84 |
| Clayton Act, Section 4 (Act. Oct. 15, 1914, Ch. 323, Sec. 4, 38 Stat. 731, 15 U.S.C. Sec. 15)..... | 2 |
| Judicial Code: | |
| Sec. 24, 28 U.S.C. Sec. 41(1) (c)..... | 2 |
| Sec. 128, 28 U.S.C. Sec. 225(a)..... | 2 |
| Moratorium Act of October 10, 1942, Ch. 589, 56 Stat. 781..... | 61 |
| Public Law 107, Ch. 213, U. S. Code Congressional Service, 79th Congress, First Session 1945..... | 61 |
| Sherman Act, Sections 1 and 2..... | 2 |
| 15 U.S.C., Section 15..... | 45 |
| U.S.C.A. T. 28, p. 890, Note 475..... | 55 |
| U.S.C.A. Sec. 16 | 66 |

TEXTS

| | |
|--|------------|
| Storey's Equity Jurisprudence, Vol. 1, Secs. 186, 187..... | 68 |
| 37 C.J.S., page 204..... | 68 |
| R. C. P., Rule 8(c), 12(b)..... | 79, 80, 81 |

IN THE

United States
Court of Appeals

For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation; MOJAVE BORAX COM-
PANY, LTD., a corporation; PAUL O. TOBE-
LER, Executor of the Last Will and Testament
of John K. Suckow, Deceased, and RUTH E.
SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC
COAST BORAX COMPANY, UNITED
STATES BORAX COMPANY, AMERICAN
POTASH & CHEMICAL CORPORATION,
STAUFFER CHEMICAL COMPANY, WEST
END CHEMICAL COMPANY, WESTERN
BORAX COMPANY, LTD., GOLDFIELDS
AMERICAN DEVELOPMENT COMPANY,
PACIFIC ALKALI COMPANY, F. LESSER,
JAMES M. GERSTLEY, FRANK M. JENIFER,
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TION, as Executor of the Last Will and Testa-
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H. BROWN, as Special Administrator of the
Estate of Victor C. Emden, deceased, et al.,

Appellees.

OPENING BRIEF OF APPELLANTS

JURISDICTION

This is an appeal from a final judgment of dismissal, entered in the District Court of the United States for the Northern District of California, Southern Division, on November 24, 1948 (R. 611-621). Notice of Appeal was filed December 20, 1948 (28 U.S.C. Sec. 230, Rule 73 R.C.P.) (R. 624). Jurisdiction of this Court is apparent (Jud. Code Sec. 128, 28 U.S.C. Sec. 225(a)).

This is a civil action between corporate citizens of Delaware and Nevada and various individuals, as plaintiffs, and a British corporation and corporate citizens of other states of the United States, as defendants (Sec. 24 Jud. Code, 28 U.S.C. Sec. 41 (1) (c)). The right of plaintiffs to sue is provided by Section 4 of the Clayton Act (Act. Oct. 15, 1914, Ch. 323, Sec. 4, 38 Stat. 731, 15 U.S.C. Sec. 15), which reads as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold damages by him sustained, and the costs of suit, including reasonable attorneys' fee."

The acts referred to as forbidden are defined in Sections 1 and 2 of the Sherman Act, to-wit:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

"Every person who shall monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

In combination, these statutes reveal the jurisdiction and venue of the District Court.

STATEMENT OF THE PLEADINGS AND FACTS

Plaintiffs herein commenced this action for damages against the defendants herein on September 11, 1947—filing the same in the United States District Court for the Northern District of California, Southern Division, Hon. Michael J. Roche, presiding. By their complaint (R. 3-80), and the two amendments thereto (R. 80-82), plaintiffs seeks to recover treble damages, based on the allegations of a violation of the anti-trust laws.

To the complaint, the defendants filed motions to dismiss and motions for summary judgment, supported by affidavits of various character. **By such motions, defendants admitted all of the allegations of the complaint well pleaded.**

Purity Cheese Co. v. Frank Ryser Co., 153 F.(2), 88 (7th Cir.);

United States v. Frankfort, etc., 324 U.S. 293, 65 S.Ct. 661;

Ansehl v. Puritan, etc., 61 F.(2) 131 (8th Cir.);

Ledbetter v. Farmers, etc., 142 F.(2) 147, (4th Cir.),
Cert. den., 323 U.S. 719;

Willson v. Graphol Products Co., 165 F.(2) 446.

Therefore, the complaint herein is the basis of the action, and in the absence of a denial by the defendants of the allegations thereof, such allegations stand as admitted facts; it is only if these facts, so admitted, do not in themselves state a cause of action, can the action be dismissed.

Furthermore, affidavits filed in support of a motion to dismiss or for summary judgment, cannot be used to contradict the allegations of the complaint.

Domestic and Foreign Commerce Corp. v. Littlejohn, 165 F.(2) 235, at 237;

Michel v. Meyer, 8 F.R.D. 464;

Frederick Hart & Co. v. Recordgraph Corp., (3rd Cir.)
169 F.(2) 580.

By reason of the foregoing, it would appear that the proper and convenient way to present the contentions of appellants on this appeal is to set out specifically in this brief the portions of the complaint which appellants contend are controlling herein as setting forth a cause of action and as demonstrating that the rulings of the lower court, set forth in its decision, are contrary to law and without basis either in fact or in law. Accordingly, we shall so proceed, and trust that this Court will find such approach both convenient and helpful.

The complaint states first, the Jurisdiction and Venue (R. 4); then the Description of Plaintiffs (R. 5), followed by a Description of Defendants (R. 6-11); then follows Definition of Terms used in the complaint (R. 11-12), followed by the Nature of Trade and Areas Involved, including (a) The Commodity, and (b) Uses (R. 12-16). Following is a history of the Development of the Industry, including (1) Lake Borax, (2) Marsh Borax, (3) Colemanite, and (4) Kernite and Searles Lake Production (R. 16-19).

The complaint then describes the Control of Industry, including the Control of Crude Borates and Control of Lake Brine Borax (R. 19-28); then follows a description of the Methods of Sale (R. 28-30).

Then follows the Offenses Charged (R. 30-39), as follows, to-wit:

64. That at the time or times herein set forth, the defendants, each well knowing all the matters and things hereinbefore alleged, and continuing thereafter up to some date in the year 1944, the exact date of which is to plaintiff unknown, were engaged in a combination and conspiracy to restrain unreasonably, and pursuant to said combination and conspiracy have unreasonably restrained, the aforesaid trade and commerce in the mining, production, processing, manufacture, distribution and sale of crude borates, refined borax and boric acid among the several states of the United States and with foreign nations, and have conspired and combined, as herein set forth, to monopolize, have attempted to monopolize, and have suc-

ceeded in monopolizing such trade and commerce, in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," as amended (15 U.S.C. Secs. 1 and 2), commonly known as the Sherman Act, and which combination and conspiracy in this paragraph described is hereinafter referred to as the "General Conspiracy."

65. The aforesaid combination and general conspiracy to restrain trade and commerce, the combination and conspiracy to monopolize, attempts to monopolize, and conspiracy to monopolize such trade and commerce, have consisted of a continuing agreement and concert of action among the defendants, the substantial terms, purposes and intent of which have been that defendants:

(a) agree to acquire control of approximately 95 per cent of the world's known deposits of borate minerals, including approximately 100 per cent of sodium borate (kernite and tincal) deposits:

(1) by purchase of newly discovered deposits;

(2) by purchase of deposits actively worked by others;

(b) agree to acquire by lease or purchase approximately 90 per cent of the world's known lake brines from which borax may be extracted;

(c) agree to purchase refining facilities of all competitors who also own deposits of borate minerals;

(d) agree to dismantle and close all refining facilities and to close all mines purchased from competitors who work deposits of borate minerals;

(e) agree to withhold from the market all colemanite ore where such ore would compete with kernite;

(f) agree to allocate among themselves the tonnage of crude borates, refined borax, and boric acid that may be sold by each defendant in various nations and in various markets, including the United States market;

(g) agree to allocate among themselves consumers of crude borates, refined borax, and boric acid, on the basis that the defendant company first supplying a user shall enjoy thereafter the right to sell such user exclusively;

(h) agree that each defendant will refuse to sell crude borates, refined borax and boric acid to customers of any other defendant;

(i) agree to reallocate among themselves periodically the amount of tonnage of crude borates, refined borax and boric acid that may be sold by each defendant in certain nations, in certain markets, and to various types and classes of consumers;

(j) agree as to the customers to which certain types of crude borates, refined borax, and boric acid may be sold;

(k) agree that no user of crude borates, refined borax, and boric acid may purchase such products except on condition that such user shall not resell or export such products;

(l) agree to trade and repurchase any crude borates, refined borax and boric acid resold or exported by users and to blacklist and boycott such users;

(m) agree to permit independent distributors to sell crude borates, refined borax, and boric acid to certain designated customers on terms fixed by the defendants;

(n) agree that no sales of refined borax shall be made for packaging by independent distributors;

(o) agree that only defendant Borax Consolidated, Ltd., or its subsidiaries, shall sell and distribute packaged borax;

(p) agree to fix the prices at which crude borates, refined borax, and boric acid will be sold to users and distributors,

(1) by fixing arbitrary and noncompetitive prices, discounts and conditions of sale on crude borates, refined borax, and boric acid;

(2) by establishing arbitrary and fixed differentials in the prices to be charged for crude borates, the various types of refined borax, and boric acid;

(3) by establishing arbitrary and fixed differentials in the prices to be charged users for the same type and quality of crude borates, refined borax, or boric acid, based upon the use to which such products are put;

(4) by fixing a minimum tonnage for a carload of crude borates, refined borax, and boric acid, and selling only on an f.o.b. plant basis, freight allowed to destination;

(5) by refusing to ship crude borates, refined borax, and boric acid in the United States by any means other than by rail;

(6) by fixing the prices at which independent distributors of defendants may resell crude borates, refined borax, and boric acid to users to whom defendants permit such independent distributors to resell.

66. During the period of time covered by this complaint and for the purpose of forming and effectuating the aforesaid combination and conspiracy to restrain trade unreasonably, combination and conspiracy to monopolize, attempt to monopolize, and actual monopolization of the interstate and foreign trade and commerce hereinbefore alleged, and to destroy competition, the defendants by agreements and concerted action have done the things which, as herein alleged, they conspired to do, and more particularly have done, among others, the following acts and things:

The Borax Industry in 1929

67. In 1929, the following companies were producing crude borates, refined borax, and boric acid in the United States: said Borax Consolidated, Ltd., through its subsidiary, said Pacific Coast Borax Company; said American Potash & Chemical Corporation; said Western Borax Company; said West End Chemical Company; and said Suckow Borax Mines Consolidated. The total production of these companies amounted approximately to 95% of the total world production.

68. Distribution and sale of crude borates, refined borax and boric acid in 1929 was made in the following manner: (a) Said APCC sold its refined borax and boric acid in the United States market direct to users and to independent distributors who resold to users. Its sales of the same product in foreign markets, except in the Orient and Canada, were made by C. Christopherson Sons, Ltd., of London, England, acting as agent. Sales in the Orient, except China, were made by Imperial Chemical Industries, Ltd., of London, England, and in Canada by the St. Lawrence Chemical Company of Montreal, Canada, acting as agents. (b) Said PCB sold crude borates, refined borax and boric acid in the United States market direct to users or to independent distributors, who resold to users. It shipped crude borates to refineries owned by its parent, BCL, and located in London, England; Dunquerque, France; Port Dundas, Glasgow, Scotland; Barcelona, Spain, and Standlau, Austria, where they were refined and sold as refined borax and boric acid by BCL in all markets of

the world except the United States and Cuba,—which were supplied by PCB. (c) Plaintiff SBM sold crude borates and concentrate borates directly to users and to independent distributors who resold to users. Its sales were made in the United States and Europe. (d) Said WEC sold its entire production of refined borax and boric acid to said Stauffer Chemical Company, which, in turn, sold in the United States market, South America, the Orient, and in Europe. (e) Said WBC sold crude borates to Deautche Vereingen (hereinafter referred to as DBV), an association of German refiners which refined the crude borates and sold refined borax and boric acid in Germany and in other European countries. DBV shared equally with said WBC the profits derived from its sales of refined borax and boric acid.

The 1929 Agreement

69. During the year 1929, various meetings were held in England and Europe between BCL, APCC, PCB and DBV, with the result that in the fall of 1929, in either England or Germany, said companies made and entered into an agreement, herein referred to as the "1929 Agreement" or the "General Conspiracy," under the terms of which the ownership and control of borax properties of all kinds and also borax in various of its forms, products and by-products, and the production and sale thereof, were agreed to be monopolized and controlled, and further, by the terms of which agreement it was provided that all competitors of the business of the parties to said agreement should be eliminated, and further, prices were fixed at which crude borates, refined borax and boric acid were to be sold; world markets and customers in specific markets were allocated among them; the production of said West End Chemical Company was limited; and the tonnage to be sold in the United States and other markets by said Stauffer Chemical Company and said Western was restricted. Said agreement was to be effective for one year, renewable annually upon three months' notice prior to expiration by mutual agreement among the parties. Such agreement was subsequently extended and modified, and, as modified, remained in full force and effect until sometime in 1944. From and after September 1, 1939, the parties to the

annual renewal of such agreement were said BCL, PCB, APCC and Stauffer. The parties to the 1929 agreement and its subsequent renewals were BLC, PCB, APCC and DBV (the latter until September, 1939). Defendants Stauffer Chemical Company and Western Borax Company, Ltd. agreed to and became at said time parties to said agreement, as will be set forth more particularly hereinafter.

The above Paragraph 69 was later amended (R. 80) to read as follows:

Paragraph 69, page 28, of said complaint, is amended to read as follows:

The 1929 Agreement

69. That during the year 1929, various meetings were held in England and Europe between BCL, APCC, PCB and DBV; that in the month of September, 1929, further meetings were held in the City and County of San Francisco, State of California, between said BCL, PCB, DBV, Stauffer Chemical Company, West End Chemical Company, and Western Borax Company, with the result that under date of the 27th day of November, 1929, said parties made and entered into an agreement, herein referred to as the "1929 Agreement" or the "General Conspiracy"—under the terms of which the ownership and control of borax properties of all kinds and also borax in various of its forms, products and by-products, and the production and sale thereof, were agreed to be monopolized and controlled; and, further, by the terms of which agreement it was provided that all competitors of the business of the parties to said agreement should be eliminated; and, further, prices were fixed at which crude borates, refined borax and boric acid were to be sold; world markets and customers in specific markets were allocated among them; the production of said West End Chemical Company was limited; and the tonnage to be sold in the United States and other markets by said Stauffer Chemical Company and said Western Borax Company, was restricted. Said agreement was to be effective for one year, renewable annually upon three months' notice prior to expiration by mutual agreement among the parties.

That within one year subsequent to said 27th day of November, 1929, defendant APCC and said Clarence McAnisse Rasor agreed to, and became parties to, said agreement and all extensions thereof.

Said General Conspiracy was subsequently and from time to time extended, enlarged and modified and as such remained in full force and effect until sometime in 1944; that all of said parties so named as members of said General Conspiracy remained as such during the life of said conspiracy.

70. As part of said 1929 agreement to fix the terms, conditions and manner of sale and distribution of crude borates, refined borax and boric acid, price schedules were adopted for sales by defendants of such products to users and distributors. Re-sale prices of distributors were also fixed. It was agreed that all sales made in carload lots in the United States would be made by the parties to the agreement, with less than carload lot sales reserved to distributors or jobbers; that a minimum carload would be 30 tons; that freight charges be made on the basis of all-rail, f.o.b. plant, freight allowed to destination; that the United States be divided into zones in which uniform prices would apply regardless of distance between the refinery and destination; that customers located in the same city, or on the same rail route, be prohibited from pooling orders so as to obtain carload prices; that a jobber or distributor be defined as a party or concern taking a minimum of two carloads a year.

71. As part of said 1929 agreement, it was agreed that no user be permitted to resell or export any crude borates, refined borax or boric acid; that no independent distributor be permitted to sell to any user except those approved by the parties to the agreement; that no independent distributor be permitted to export crude borates, refined borax, or boric acid. This restriction was thereafter rigidly enforced by a system of espionage under which the parties to the agreement attempted to and did locate and repurchase any crude borates, refined borax or boric acid sold contrary to the provisions of the agreement set out in this paragraph. Any user or distributor so selling was black-listed and boycotted.

72. As part of said 1929 agreement, the parties agreed to allocate among themselves world markets for crude borates, refined borax and boric acid on the basis of tonnage, customers and types of use to which such products are put; to divide customers among themselves on the basis that the first supplier offering crude borates, refined borax and boric acid would thereafter enjoy the exclusive right to supply such user; that no party to the agreement would supply any customer previously supplied by any other party to the agreement; that no party to the agreement would solicit the customers of any other party to the agreement; that no party to the agreement would supply any customer with a new borax product if any other party to the agreement was unable to offer the same product to users in the same general industry.

73. That plaintiffs are informed and believe, and therefore allege, that said "1929 Agreement" constituted a reduction to writing of the previous verbal and written agreements, understanding, combinations and conspiracies of defendants, and, from time to time made and entered into by said defendants during the years previous to the making and entering into of said "Agreement of 1929."

The above Paragraph 73 was later amended (R. 82) to read as follows:

73. That as part of said 1929 Agreement, said defendants agreed specifically among themselves to destroy and eliminate the said John K. Suckow and each and all of his companies and associates from all operations of every kind and involving the production, distribution or sale of borax or any of its products.

74. That said "General Conspiracy" and the conspiracies, acts and things complained of hereinbefore and hereinafter in this complaint set forth, were and are continuing conspiracies, and each separate thing and act alleged herein and performed by the defendants, or some of them, or any of them, have been and are acts, things and combinations contributing to and forming a part of said "General Conspiracy."

75. That pursuant to said "General Conspiracy," defendants, or some of them, proceeded to, and did, take

steps and means to eliminate, through purchase or otherwise, various competitors of said defendants, not parties to said conspiracy, combination or agreement, including plaintiffs.

The complaint then goes on to describe, in Paragraphs 76 and 77 thereof (R. 39-40), the conditions involving Dehydrated Borax and the fixing of prices in connection therewith.

Following this, the complaint sets forth the Effects of the Conspiracy and alleges, in Paragraph 78 (R. 40), as follows:

78. The agreement and concerted actions of the defendants, alleged in this complaint, both hereinbefore and hereinafter, pursuant to and in furtherance of the conspiracies hereinbefore and hereinafter alleged in this complaint, have had the effect, as intended by the defendants, of fixing the terms, conditions and manner in which crude borates, refined borax, boric acid and kernite are mined, produced, manufactured, distributed and sold in the United States and foreign countries; of channelizing the system of distribution and sale of such products throughout the United States and in foreign countries; of fixing prices on such products sold to industrial users, as well as resale prices on such products when sold to industrial users, independent distributors of defendants, as well as other terms and conditions of resale; of monopolizing virtually 100% of the world's supply of borate minerals, including 100% (except said "Little Placer") of the world's known deposits of the most valuable sodium borate (kernite and tincal); of monopolizing approximately 90% of the world's supply of refined borax produced from lake brines; of determining the use to which refined borax and boric acid may be put, as well as the conditions under which they may be used.

The following portion of the complaint deals with the appellants, commencing with Paragraph 79 (R. 41, et seq.), and wherein is set forth the story of John K. Suckow and his activities in the borax field and the discoveries he made therein. The allegations of this paragraph show how appellees gradually

planned and schemed to place Suckow under their control and the various steps by which such control and domination were sought. Such paragraph is as follows:

John K. Suckow came to the United States of America in 1898, and subsequently became a citizen thereof. He passed his examination as a pharmacist in New York City, studied medicine at the University of Southern California, where he obtained his degree of Doctor of Medicine in the year 1905. Becoming interested in farming and having the intention of erecting a desert hospital, he and his wife filed Desert Land Entries on Section 22, Township 11 N., Range 8 W., in the Mojave Desert, Kramer District, State of California. This was during November, 1912.

While drilling for water on said Section 22, he discovered a colemanite deposit; he did not know what the material was, nor its value. This material he showed to C. M. Rasor, an agent of defendant PCB. Lou Rasor, brother of said C. M. Rasor, and who was at said time a patient of said Dr. Suckow, advised said Suckow that it was colemanite. Shortly thereafter, John Ryan of the PCB, or some of its affiliates, called upon said Suckow and advised him that there was some colemanite in such sample but that it was not much, and offered Suckow \$4,000 for the property from which said material was produced.

In 1913, said Suckow sold whatever interest he had in a portion of said property where the said discovery was made, to defendant United States Borax Company for the sum of \$4500.00. The property disposed of was the northwest quarter and the east half of the northeast quarter of Section 22.

In March of 1917, said Suckow received a patent to the balance of said Section 22, and on October 22, 1917, he conveyed an undivided 75 per cent interest in the said property to defendant Stauffer Chemical Company, for which said Suckow was to receive \$60,000 from an operating company, and become manager thereof. Said Stauffer Chemical Company was to erect a borax refinery in Los Angeles, California.

Early in 1918, said Stauffer Chemical Company advised said Suckow that a Mr. Rasor had been informed of said

1917 agreement and was very interested in ascertaining the borax contents of the property; subsequently, and on or about December 2d, 1918, a new agreement was entered into by said Suckow and defendant Stauffer Chemical Company and to which agreement defendant Pacific Coast Borax Company was a party. By said agreement, it was provided that said Suckow should control the new company, thereafter incorporated under the name of Suckow Chemical Company, through a voting trust of his and the stock owned by said Stauffer Chemical Company; that, in truth and in fact, the whole purpose of the formation of said Suckow Chemical Company and the distribution of the stock thereof, as herein set forth, was to prevent said Suckow from independently, and as an individual, operating upon said Section 22 and ultimately to secure from him his stock in said Suckow Chemical Company. That after the organization of said company, said Suckow was constantly harassed by defendant Stauffer, PCB, and various of the other defendants herein, and prevented, under one pretext or another and by one objection after another, all unfounded, from carrying on and operating said Suckow Chemical Company as originally contemplated by him and/or for the purposes or in the manner indicated by said last-named defendants when the question of the incorporation of said Suckow Chemical Company was discussed with said Suckow; as a result of said opposition and actions of said defendants and in order to save and protect the interest that he, the said Suckow, had in said Suckow Chemical Company and the properties owned by such company, he was forced to, and did, on or about June 30, 1925, sell all of his capital stock in said Suckow Chemical Company for the sum of \$150,000 to the defendant PCB. That as a part of said plan to eliminate said Suckow from said Suckow Chemical Company, said Victor C. Emden was employed as an agent by defendant PCB to bring about such sale, and for the purpose thereof to represent himself as an independent purchaser, in an endeavor to hold down the price ultimately to be paid to said Suckow; that plaintiffs are advised and believe, and on such information and belief allege, that for his said services in behalf of said PCB, said Emden was paid the sum of \$15,000 by said PCB;

that in addition to said payment, the Suckow,—without knowledge of the fact that said PCB had paid said \$15,000 to said Emden, paid to said Emden the sum of \$10,000 as commission upon said sale; that said payment by said PCB to said Emden was not discovered by, and did not become known to, plaintiffs herein or said Suckow until sometime approximately within two years prior to the commencement of this action.

Said Suckow Chemical Company is still in existence, according to the information and belief of plaintiffs, and the stock thereof is held by defendants Pacific Coast Borax Company and said Stauffer Chemical Company, or one of said corporations.

80. On or about January 1, 1916, said Suckow, with other co-locators, filed placer mining locations covering the whole of Section 14, T. 11 N., R. 8 W., S.B.M., which at that time was vacant public land of the United States. Said locators claimed the entire section as prospective borax-bearing lands. Subsequently, notices of intention to hold mining claims were filed.

In 1917, various adverse locations were filed all over the southwest quarter of said Section 14 by T. M. Slusser and associates; one George R. Widdess located adversely on the east half of the southeast quarter on May 16, 1917; that plaintiffs are informed and believe, and therefore allege, that said Slusser and associates and said Widdess were, and did so act in the matter of said locations as, agents and representatives of said defendants, or some of them; the purpose of said various locations was to cloud the title of said Suckow in and to said properties, all with the purpose of forcing said Suckow to make and enter into the contract referred to hereinafter.

* * * * *

That thereafter and on October 24, 1921, and pursuant to said agreement, defendant United States Borax Company conveyed to said Suckow an undivided one-half interest in and to the S.W. $\frac{1}{4}$ of said Section 14. Subsequently, and on November 7, 1922, said defendant, pursuant to said agreement, caused to be conveyed to said Suckow an undivided one-half interest in the west half of the S. E. $\frac{1}{4}$ of said section.

All of said patents were obtained on the discovery of colemanite by drilling, *and it was not known to said Suckow,—and the fact thereof was concealed by defendants from said Suckow at said time, that more valuable deposits of sodium borate actually underlaid the colemanite.*

On or about August 19, 1922, and after securing the patent on the S.W.¼ and before issuance of the patent for the West Half of the S.E.¼, one C. R. Dudley, representing defendant Pacific Coast Borax Company, located the south half of Section 14 as Lode Claims 1 to 9, all without Suckow's knowledge and on lands claimed by said Suckow as placer claims.

Plaintiffs are informed and believe, and therefore allege, that said locations were made for the purpose of further clouding Suckow's title and apparently making him believe that by subsequently turning over to him at a later date a half interest in Lode Claims 1 to 7, that his interest in the whole South Half of said section were safeguarded against other comers. However, Lode Claims 8 and 9 were not transferred to Suckow, who had no knowledge of their existence nor that said last-mentioned claims were located on the eastern half of the S.E.¼.

Sometime during the year 1922, the exact date being to plaintiffs at this time unknown, defendant Pacific Coast Borax Company, and its associates, abandoned any claim to the North Half of said Section 14; subsequently thereto, said Suckow obtained title to the North Half of said Section 14. In the year 1925, defendant United States Borax Company obtained a patent to the East Half of the S.E.¼ of said Section 14 on the location of said Widdess and upon obtaining said patent refused to convey to said Suckow an undivided one-half interest therein, as said defendant was obligated to do by said agreement of December 21, 1918, said defendant claiming that said property was not included in said agreement.

In the fall of 1926, said Suckow commenced drilling on the common property in said Section 14, and in April, 1927, defendant United States Borax Company, on its own behalf as well as on behalf and acting for its associates, and some of the other defendants herein, advised said Suckow that it had learned that he had commenced de-

velopment work on a mine located on the said common property, to-wit, on the West Half of the Southeast Quarter of Section 14, and that said defendants did not desire to join in the work. During the next few months, said Suckow sunk a deep shaft and discovered a rich deposit of tincal, and when defendant Pacific Coast Borax Company learned of this discovery, defendant Pacific Coast Borax Company promptly advised said Suckow that it and its associates did desire to participate, not only in the mining operations but also in the marketing of all ore produced as a result thereof. Said Suckow refused to comply with such demand, whereupon defendant Pacific Coast Borax Company, and its associates, immediately began to harass said Suckow, notifying him that certain of his equipment was located on Section 23, which belonged to Pacific Coast Borax Company, and demanding immediate removal thereof; in addition, said Pacific Coast Borax Company, and other defendants herein, wrote to various purchasers of the ore produced by said Suckow from said development work, advising them that they would be held responsible for one-half of the value thereof. In further pursuance of said harassing endeavors, said defendant Borax Consolidated, Ltd., on or about September 21, 1927, commenced an action against defendant Suckow in the Superior Court of the State of California, in and for the County of Kern, entitled, "Borax Consolidated, Ltd., versus John K. Suckow" and numbered on the records of said court No. 20694, in which action plaintiffs therein sought an accounting from defendant Suckow and a judgment determining the rights of plaintiffs and its associates to the ore and for an injunction to prevent further mining of said property by said Suckow. After a deposition of said Dr. Suckow was taken in said action, the said action was dismissed by BCL on or about the month of March, 1930.

That on or about the 13th day of August, 1929, said Suckow commenced an action against defendant United States Borax Company and certain other defendants named herein to compel said defendants to transfer and convey to him, pursuant to said agreement of December 21, 1918, hereinabove set forth, an undivided one-half interest to the E.½ of the said S.E.¼ of said Section 14. Said action never

came to trial; however, a consent judgment was rendered on October 2, 1934, as a part of the agreement of August 18, 1934, hereinafter more specifically referred to.

81. That on the 6th day of March, 1929, plaintiff Suckow Borax Mines Consolidated, Inc., was incorporated under the laws of the State of Delaware, whereupon the said John K. Suckow deeded and transferred to said corporation his undivided one-half interest in and to said 240 acres of land in the South Half of said Section 14 and also the whole title and fee of 40 acres in the North Half of said section, on which the calcining plant was situated, and thereafter the said Suckow Borax Mines Consolidated, Inc. became, and was, the owner and holder of the legal title to said property until such times as hereinafter set forth. That subsequent to the organization of said Suckow Borax Mines Consolidated, Inc., said Suckow caused said corporation last-named to make and enter into a contract dated on or about September 4, 1929, with N. K. Kemische Fabrike Gembo, hereinafter called Gembo; said Gembo was a Dutch corporation and engaged in the business of marketing chemicals. Said contract provided that said Suckow Borax Mines Consolidated, Inc., should sell, at cost, 4,000 tons of crude borax to Gembo each year; the latter was to erect a refinery in Holland and the two companies were to share equally in the net profits derived from the sales by Gembo of the refined products produced at said refinery.

82. When defendants herein learned of the making of said contract with said Gembo and that through such contract an outlet was afforded to said Suckow Company by said agreement, and that it, the said Suckow Company was in a position to distribute sodium borate in Europe to various users thereof, all in competition with said defendants, said defendants, or some of them, made and entered into, as a part of and in furtherance of said General Conspiracy, an unlawful plan to destroy the said business of said Suckow and said Suckow Company, and all possibility of his or its performance of said Gembo contract, planning and scheming, through various fictitious actions at law and in equity, and by all and various other means within their power, to destroy the said Suckow and said Suckow Company and his and its said business and

possibilities; in pursuance of such plan, one C. B. Zabriskie, then president of defendant Pacific Coast Borax Company, and defendant Ashburn, as attorney for said company, together with various of the other defendants named herein, caused said defendants herein, or some of them, to enter upon a course of conduct to bring about the financial and business destruction of said Suckow and said Suckow Company.

Following this, comes Paragraph 83, setting forth a statement of the **overt acts** performed and carried out by the defendants pursuant to the conspiracy. Said Paragraph 83 (R. 53) is as follows:

83. Plaintiffs have been informed and believe, and therefore allege, that in pursuance of said General Conspiracy defendants, or some of them—those acting, doing so as agents and representatives of the remaining defendants—did perform and carry out, among others, the following overt acts, to-wit:

(a) Defendant Pacific Coast Borax Company and other defendants at various times attempted to acquire, by purchase or otherwise, said Suckow Company's undivided one-half interest in said jointly owned property in said Section 14, and endeavored, by various means, pressures and activities, to force said Suckow Company to said sale, and also endeavored by various means to force said Suckow to sell to them the property in said Kramer District personally owned by said Suckow and not belonging to said Suckow Company;

(b) That on or about the 29th day of March, 1930, defendant Borax Consolidated, Ltd., on its own behalf and the behalf of said other defendants, commenced an action in the United States District Court for the Southern District of California against said Suckow Borax Mines Consolidated, Inc. and said John K. Suckow, praying for an injunction restraining said defendants from mining or operating upon said Section 14, and also for an accounting and for damages; said action will be hereinafter designated as the Equity Suit. Said application for an injunction was heard before United States District Judge Paul J.

McCormick in July, 1930, and was denied. The remaining issues in said action came on for trial in April, 1932. Said equity action was filed for the purpose of harassing said Suckow and said Suckow Company, ostensibly claiming ouster by Suckow and demanding an accounting, and with the idea and intent, if possible, of terminating the mining operations, or, if not, of disrupting ore delivery to Europe, and of forcing said Suckow to violate his own contracts, and of forcing him and it finally to sell to defendants, or some of them, the said property owned and held by said Suckow Company and said Suckow; and that if said sale could not be consummated as desired by defendants, to destroy and eliminate all competition by said Suckow and said Suckow Company with defendant Borax Consolidated, Ltd., and said other defendants, in all borax operations throughout Europe and the United States.

That during all of said times in this paragraph referred to, and also during the time of the operation by said Suckow and said Suckow Company of said mining property, said Company and said Suckow endeavored in every way possible to cooperate with defendants owning the other undivided one-half of said mining property, and during said operations, and among other things, offered to account to defendants and to segregate the extracted ore ton by ton, to mine equally with defendants, or the one holding title to said one-half of said mining property, and in various other ways; that all of said offers of said Suckow and said Suckow Company were rejected by said defendants.

That upon the hearing of said equity suit, the question of the value of the ore produced from the property involved in such litigation arose, and by chicane and false testimony and by other devious means, the court trying said equity suit was persuaded to fix the value of said ore at \$21.89 per long ton removed; that in the bankruptcy proceedings subsequently involving said Suckow Borax Mines Consolidated, Inc., and hereinafter described, the value of said ore was fixed by the United States District Court at \$2.50 per ton. Upon the making of said order in said equity suit fixing the value of said ore as aforesaid, said Suckow Company was obliged to, and did, cease

all mining operations, and the exorbitant value so placed on said ore compelled the closing down of said mining property.

THE BANKRUPTCY PROCEEDINGS

(c) That upon the 30th day of June, 1931, defendant Pacific Coast Borax Company, defendant Ashburn, and various others of said defendants, caused to be filed in the United States District Court in and for the Southern District of California, an involuntary petition in bankruptcy against plaintiff Suckow Borax Mines Consolidated, Inc. Such petition was purportedly filed by defendant Walter H. Moses, an attorney for one L. E. Ellington, Foltz Electric Company and Pacific Iron & Steel Company, with claims of \$88, \$200 and \$1,206.27, respectively; as a matter of fact, said Ellington claim had been paid before said petition was signed by Ellington and the said Foltz claim was paid in the regular course of business between the date of verifying the petition and its filing; plaintiffs are informed and believe, and therefore allege, that the claim of said Pacific Iron & Steel Company was purchased or paid for prior to the filing of said petition, by one of the defendants herein, or by their attorneys or agents, the exact one of which being to plaintiffs at this time unknown; that said bankruptcy petition was brought about, in part, through the efforts of one Victor C. Emden, a paid agent and employee of defendant Pacific Coast Borax Company, and who had been previously so employed to secure a signature to said involuntary bankruptcy petition (all or part of such expenses being paid by C. M. Rasor as agent of PCB), with the thought, intent and purpose on the part of defendants to harass and annoy said Suckow and plaintiff Suckow Borax Mines Consolidated, Inc. by said bankruptcy proceedings,—in order to assist in forcing said Suckow and said Suckow Borax Mines to cease business and ultimately to sell to said defendants, or some of them, at a price far below the real and true value of the properties so owned by said Suckow and said Suckow Company, all pursuant to said "General Conspiracy" hereinabove alleged. That in addition, it was the said

plan and conspiracy of said defendants to build up to as great an extent as possible, by fictitious and other means, the indebtedness of said Suckow Company and at the same time hold down the value of the assets of said Suckow Company, including the estimated value of ore owned by said company; and with this intent and purpose in mind, the said Emden, together with said defendants, secured the signature of one L. H. Wilson to said petition of involuntary bankruptcy and who claimed that he was a stockholder of said Suckow Company and that before purchasing said stock he had not been shown a copy of the permit of the Corporation Commissioner of the State of California. Said claim was wholly false and untrue. In addition, said defendants and said Emden caused to be listed among the liabilities of said Suckow Company a purported claim of said Suckow against said Suckow Company in the amount of \$76,922, and another purported claim of said Suckow against said Suckow Company in the sum of \$15,621—which latter sum had originally been loaned to said Suckow Company but subsequently, and before said filing of said bankruptcy petition, had been donated and released to said Suckow Company by said Suckow. That in truth and in fact, said Suckow did not make said claim of \$76,922 against said Suckow Company and at all times contended and insisted that said Suckow Company did not owe him said last-named sum or any part thereof and as based on the alleged facts of said claim. Said Suckow Company resisted said petition for involuntary bankruptcy and contended that its assets exceeded its liabilities, and on a hearing as to the value of said assets, said defendants, in the face of the fact that they had previously contended that the value of the ore on said property was \$21.89 per long ton in the ground, in said bankruptcy proceeding contended that said value of said ore did not exceed \$2.50 per ton in the ground. Through false and fraudulent testimony, said defendants persuaded the Referee in Bankruptcy—and ultimately the Judge of the United States District Court hearing said bankruptcy proceeding—that the value of said ore did not exceed \$2.50 per ton and that the alleged claims of said Suckow against

said Suckow Company, as above set forth, were valid,—with the result that on March 2, 1933, said Suckow Company was formally adjudged a bankrupt, and in the following month a trustee in bankruptcy of said Suckow Company was elected and appointed. That thereafter, and in due course, plaintiff Suckow Company appealed to the United States District Court of Appeals in and for the Ninth Circuit, from said order of adjudication; that ultimately, and on or about the 18th of August, 1934, when the settlement hereinafter referred to was made, and as a part thereof, said appeal was dismissed.

(d) That subsequent to the adjudication of said Suckow Company as above set forth, said Suckow requested said bankruptcy trustee to lease to him said property so owned by said Suckow Company, but defendants objected thereto,—and due to said opposition, said request was denied. During all of said time said defendant Pacific Coast Borax Company and other defendants herein continued their endeavors to acquire all of the properties and assets of said Suckow Company and to force said Suckow into a sale of all of his interest in borax-bearing lands in said Kramer District and in said Suckow Company, to said defendants. When this was not able of accomplishment, defendant Pacific Coast Borax Company commenced endeavors to secure a lease on said properties, both for the purpose of preventing any other operation of said properties as well as to eliminate competition of said ore from said properties with that from other properties owned by said defendants, or some of them, and to further effect this said purpose defendants commenced operations to cause said Gembo contract to be cancelled or otherwise disposed of, as well as to take over the customers of the said Suckow Company, to-wit, Gembo Company and the Liverpool Borax Company, as customers or agents for the sale and distribution of borax throughout various portions of Europe. Defendant Pacific Coast Borax Company was subsequently successful in its efforts to secure a lease upon said property of said bankrupt, with the result that on or about the 17th day of April, 1934, and after court proceedings to such end, a lease was granted by said trustee to said defendant Pacific Coast Borax Company, which lease was for

a period of five years from April, 1934 to April, 1939, and which gave and granted to said lessee therein named immediate possession; said lease covered 240 acres of said bankrupt's property and an additional 40 acres on which the calcining plant was located. It was further provided that said lessee should not be required to work or perform services upon said property covered thereby pending the decision of the appeal of said bankrupt from the order adjudging it such bankrupt; the rental of said premises was to be at the rate of \$5.00 per ton for the first 500 long tons, \$4.00 per ton for the second 500 long tons, and \$2.50 per ton for all ore in excess of 1000 tons removed on account of the bankrupt's share of the ore and mined during any single month.

(e) Said lease was obtained by fraud and misrepresentation, in that defendants claimed that they were not in violation of the anti-trust laws of the United States and were not a monopoly or price-fixers, whereas in truth and in fact said defendants were at said time guilty of such violations of said anti-trust laws; that said lease was also unjust and unfair and unbusinesslike, and was sought solely for the purpose of securing the sole contract and operation of said property and in order to control the production therefrom. That the granting of said lease by said trustee was vigorously opposed by plaintiffs and the officers of said SBM refused to sign or agree to the same.

That in due course, said bankrupt instituted a proceeding to review the said order of said Referee authorizing said lease, and upon its affirmation by said United States District Court appealed therefrom to the United States Circuit Court in and for the Ninth Circuit, where said appeal remained until the same was dismissed pursuant to said stipulation and settlement of the 18th of August, 1934.

(f) Meanwhile, and in order further to harass said Suckow and said Suckow Company, defendant Pacific Coast Borax Company commenced a patent infringement suit in the United States District Court in and for the Southern District of California against said Suckow Company, claiming that machinery used by said Suckow Company in the handling of said ore infringed upon certain patents held by plaintiff in said action; that, as aforesaid, said action

was commenced with the idea of taking whatever action might be possible to complicate matters further for said Suckow and said Suckow Company; said action was tried in said court on or about September, 1932, and an interlocutory decree was granted restraining defendant therein from using a certain method for calcining borax. Thereupon, said defendant in said patent infringement action appealed from said decree to the United States Circuit Court in and for the Ninth Circuit, and which appeal remained pending until dismissed pursuant to said agreement of settlement dated August 18, 1934.

Following in the same paragraph, subdivision (9) sets forth a statement of the various litigation in which appellees embroiled appellants, or some of them, in an endeavor, as alleged in sub-paragraph (8) of sub-paragraph (g) (R. 64-65), and with the intent and purpose of harassing said Suckow and associates and financially destroying them and eliminating them and each of them from all activities in said borax business; and further, to compel said Suckow and his associates to turn over all of their ore to appellees, or those to be named by them, at a price and on a basis far below the real and true value of said assets desired to be acquired by the appellees.

There are seven different actions or proceedings set forth in such subparagraph (g) of the complaint, describing in particularity each one of them.

In the decision of the lower court it is said (R. 620), "The instant complaint fails to affirmatively allege any injuries suffered by reason of the defendants' alleged violations of the anti-trust laws." The allegations of Paragraph 84 of the complaint (R. 65) completely refute and contravert such finding of the lower court. For the purpose of the present proceeding, the allegations of such Paragraph 84 are admitted by the appellees, and, in the face of such admission and also of Rule 8a, l. 1, there was no foundation or basis of any kind whatsoever for the above-referred-to portion of the decision of the lower court. Such Paragraph 84 is as follows:

84. That due to said bankruptcy proceedings and to each and every of said other activities of said defendants, or some of them, as herein set forth, and all pursuant to and in furtherance of said "General Conspiracy" referred to hereinabove, *said Suckow and said Suckow Company were destroyed financially and left without means or opportunity further to engage in the said borax business or any of its activities in any form whatsoever, and as a result thereof and by reason thereof, said Suckow was forced and compelled eventually to make and enter into an agreement or so-called settlement with defendant Pacific Coast Borax Company*, and which agreement was dated the 18th day of August, 1934 and made by and between John K. Suckow and Ruth E. Suckow, the wife of said John K. Suckow, as sellers and parties of the first part, and defendant Pacific Coast Borax Company, as buyer and party of the second part; that said agreement provided, among other things, that said Pacific Coast Borax Company should obtain another and more favorable lease upon said property of said Suckow Company from said bankruptcy trustee, and to which lease said Suckow Company would agree and become a party thereto as lessor. Furthermore, that said Suckow and/or said Suckow Company would convey, or cause to be conveyed, to said Pacific Coast Borax Company, four different parcels of real property, together with a quit-claim deed from said John K. Suckow and his said wife, Ruth E. Suckow, Mojave Borax Company, Ltd., and Suckow Borax Company, Ltd. to defendants United States Borax Company and BCL to certain other real property referred to in said agreement; that said Suckow and said Suckow Company should dismiss or cause to be dismissed all of his or its actions hereinabove referred to against defendants Pacific Coast Borax Company, Borax Consolidated, Ltd., and United States Borax Company, and release all possible claims against said PCB, BCL and USB; in turn it was further provided that said Pacific Coast Borax Company should dismiss or cause to be dismissed all said actions against said Suckow and said Suckow Company, and pay said Suckow \$150,000 in a certain manner and upon certain conditions set forth in said agreement, and further agreed to obtain a release of the said Gembo claim

and contract. That said lease referred to in said agreement provided that in compromise of Borax Consolidated, Ltd.'s alleged claim to 16,291 tons of ore and which represented one-half of the ore removed by Suckow or said Suckow Company from said property, said Borax Consolidated, Ltd. would be entitled to remove a tonnage equal to said tons previously removed by said Suckow or said Suckow Company, all without obligation therefor on the part of said Borax Consolidated, Ltd.; further, that said lease should cover a period commencing September 17, 1934 and ending September 17, 1944, with the right of said lessee to terminate said lease at lessee's option at any time subsequent to the first five years of said lease; furthermore, that said lessee therein named should not be required to mine said property and that no payment should be made for one half of the ore mined, and for the payment of minimum rentals graduated from \$2500.00 per month during the first year up to \$4,375.00 per month during the last year of said lease.

That neither said Suckow nor said Suckow Company would have made or entered into said agreement of August 18, 1934, except for the desperate financial condition in which he and it found themselves as a result of said activities, plans and schemes of said defendants, or some of them, and as outlined and set forth hereinabove.

Furthermore, at said time of making and entering into said agreement of August 18, 1934, neither plaintiffs nor said John K. Suckow, nor any of them, had any knowledge of any kind, nature or description whatsoever of said "General Conspiracy" referred to hereinabove nor of the violation by said defendants hereinabove alleged of said anti-trust laws of the United States, and said agreement of August 18, 1934 was made by said Suckow and his wife and said Suckow Company, and all things were done and performed as called for by said agreement by said Suckow and his said wife and said Suckow Company and required thereby to be done or performed, without knowledge of any kind whatsoever on the part of plaintiffs herein of said "General Conspiracy" or of the violation by said defendants of said Sections 1 and 2 of said Title 15. That none of said plaintiffs knew or became

aware of said violations by said defendants of Sections 1 and 2 of said Title 15, or of said "General Conspiracy," until on or about the fall of 1944 and subsequent to the commencement of an action by the United States versus certain defendants herein and filed in the United States District Court for the Northern District of California, Southern Division, on September 14, 1944, and numbered therein 23690-G; that on or about the said last named date, the United States Grand Jury for the said Northern District of California, Southern Division, found and returned an indictment against certain of the defendants herein, charging them with the violation of said anti-trust laws, particularly Sections 1 and 2 of said Title 15; that it was not until subsequent to the filing of said action by the said United States against said defendants herein and subsequent to the return of said indictment, that plaintiffs herein, or any of them, discovered the true facts of the situations presented herein or learned of said "General Conspiracy" referred to hereinabove, or of the fact that said defendants herein had violated said Sections 1 and 2 of said Title 15(a); that said action by the United States and said indictment are more particularly hereafter in this complaint described.

85. That in or about the spring of 1938, the said bankruptcy proceedings of SBM corporation were terminated and the property and assets of said corporation returned to said corporation by the trustee in bankruptcy and pursuant to the order of the said court therefor; that previously thereto, all of the debts of said SBM corporation had been paid, together with all of the administration expenses. During said bankruptcy, all income, except the approximate amount of \$12,000, which was used to rehabilitate parts of the mining property according to said lease of September 17, 1934, had been used to pay off said bankruptcy creditors and administrative expenses.

86. Under the terms of said lease of September 17, 1934, said lessee therein, to-wit, said PCB, had the right to terminate said lease upon its option at any time subsequent to said September 17, 1939; that due to said provision, the said management of said SBM did not know, or could not ascertain, prior to the return of said SBM of its

said property and assets as aforesaid, whether or not said lease would be cancelled and said mine returned to it, or if said PCB would continue to operate under said lease. During said time in which said ore was not mined by said lessee, ore represented by prepaid royalties accrued to said lessee, and such fact, together with the right granted said lessee in said lease to remove ore from said mine at any time said lessee saw fit, put said property of said SBM in a most hazardous position.

87. That subsequent to the execution of said lease and the entering into possession of said property by said PCB, the said PCB operated said mine in an unmineralike, inefficient and incompetent manner, with the result that during the year 1937 a cave-in occurred on said property after a charge of dynamite had been set off at the termination of current mining operations at the end of a certain day. Said cave-in was purportedly not discovered until the following morning. Such cave-in occurred in that part of the mine in a northeasterly direction from the shaft which was in the line of the most probable continuance of the ore deposit itself. Said cave-in made it impossible for the officers of SBM to further evaluate the existing ore deposit correctly, since all passageways leading in said northeasterly direction were either destroyed by said cave-in or blocked by heavy cribbing installed by PCB; that said defendants attempted to convince said SBM that said cave-in was an act of God and endeavored to persuade and force said SBM to admit that such was a fact; whereas, in truth and in fact, said cave-in was the result of the negligence and carelessness of said PCB, and, as plaintiffs are informed and believe, and therefore allege, was purposely brought about in an endeavor to damage said mining property,—in the expectation, hope and desire that said plaintiffs herein would become discouraged and sell, or agree to sell, all of their interest or interests in said mining property at a price far below the real value; that said intent and purpose of said PCB was not discovered and known by said plaintiff until late in the fall of 1944.

88. That between the latter part of 1939 and the year 1942, said defendants, and particularly PCB and Ashburn, endeavored to persuade and/or force said SBM and said

Suckow either to agree to the execution of a new and substituted lease upon said property or to sell all the interests of said plaintiffs, or those then enjoying the ownership of said property, to said defendants, particularly, said PCB; *and to such end and with such intended purpose, said defendants threatened or charged, and did, among other things, the following, to-wit:*

(a) Threatened that if said SBM would not lease again and/or sell all of its interest in said property covered by said lease to said PCB, the latter company would totally exhaust the said property by mining all the ore for which it had prepaid royalty from the uncaved accessible part of said mine.

(b) That during said time, said PCB, then owning certain adjoining property of a similar character on said Section 23, mined ore from the said property on said Section 23 and removed it through the shaft upon said property covered by said lease, all without right so to do and in contravention of the terms and provisions of said lease; that said Suckow and said SBM protested said actions on the part of said PCB and said protests were unheeded and defied by said PCB.

(c) That at various times during said period, the exact dates of which being to plaintiffs at this time unknown, defendants PCB and Ashburn advised SBM that if and when said lease was terminated, and notwithstanding the clause in said lease for the return and re-delivery of said mining property to said SBM, said defendants would not return or re-deliver or remove from said property, upon the false and fraudulent claim that at the time the order for joint operation of said property was made and the price of \$21.89 per ton was established as aforesaid, the court in establishing said order took into consideration the question of depletion and depreciation, and that by reason thereof said defendants became part owners of the depleted and depreciated mining property; that said claim was false and untrue and made for the purpose of harassing and disturbing plaintiffs, particularly said SBM.

(d) Sometime subsequent to said cave-in on the main level of said mine, defendant PCB commenced to mine the second level of said mine, such being a deposit approxi-

mately 12 feet under the upper strata of said mine, and in the further attempt to ruin said property, mined said lower level in a careless, unminerlike and unworkmanlike manner, using timber of low grade in the performance of such work. The structure of the ore body had become weakened by the water which was not disposed of properly and which entered the lower level, causing said mine wall to bulge at the floor, with the result that a new cave-in occurred on said lower level under and beneath the caved-in area of the main level.

(e) By this time, to-wit, December, 1942, and due to the said harassments of said defendants and many other similar instances too numerous to herein set forth, said officers of said SBM became discouraged and feared that they and said SBM would become unable to cope with the prospective legal entanglements brought about and threatened by said PCB and others of said defendants; said defendants, all of whom were well aware of such condition of SBM, renewed their endeavors to secure a new and more favorable lease on said mining property, or, in lieu thereof, to compel plaintiffs to consent to the sale of said mining property by said SBM. Said activities of defendants continued from and through the year 1939 to the end of 1942. Notwithstanding said activities of said defendants, said SBM prepared for the resumption of mining said mine upon the expiration of said lease held by said PCB, and in this connection purchased certain necessary machinery, with the intent and purpose of operating said mine to its utmost upon the termination of said lease; but said persecutions by said defendants of said plaintiffs continued, with the result that in 1942,—and due to the threats of defendants—said SBM entered into negotiations with said defendants for the execution of a new lease and which negotiations continued over a period of many months, during which said defendants endeavored in every way possible to force said SBM to the execution of a lease embodying terms of great disadvantage to said SBM; that ultimately said plaintiffs refused to enter into any such lease as suggested by defendants, with the result that ultimately, and due to the past experience of plaintiffs with said defendants and their manner of operating said mining property and their many

other persecutions of plaintiffs and the threats not to surrender the property to said SBM on the expiration of said lease, and due, among other things, to the fact that all of the former customers of said SBM in England and Holland had been taken over by defendants and many of the refineries on the European Continent using raw or calcined ore had discontinued their operations for lack of such ore, and the further fact that all of the former European markets of said SBM had been lost through the activities of defendants, or some of them, said plaintiffs consented that said SBM sell, and said SBM did sell, to defendant Borax Consolidated, Ltd. its interests in and to the following described property: (Here follows a description of the property involved.)

And also consented to the surrender by said PCB of said lease dated September 17, 1934 and to the release by said SBM to PCB of any and all obligations to perform any of the terms of said lease, and, in addition, consented to the release of any and all claims, demands and causes of action whatsoever not arising out of or under said agreement of sale; and also that said SBM should execute a bill of sale to said PCB to all of the personal property described in said Schedule A attached to said lease dated September 17, 1934, between SBM and Hubert F. Laugharn, trustee in bankruptcy, as lessors, and PCB as lessee—all for the sum of \$350,000; that said sales were consummated during the month of December, 1942, pursuant to the foregoing terms.

89. That neither plaintiffs nor any of them had at the time of said agreement of August, 1934, and hereinabove described, or at the time of said sales of December, 1942, any knowledge, intimation, or cause to believe that said "General Conspiracy" hereinabove described existed, or that defendants had specifically and pursuant to said General Conspiracy planned the financial and other destruction of said Suckow and said SBM; that said "General Conspiracy" was at all times fraudulently and otherwise concealed from plaintiffs by defendants; that said plaintiffs did not discover the existence of said "General Conspiracy" or said plan to destroy said Suckow or said SBM until subsequent to September, 1944, at which

time the United States Government brought an action in the United States District Court, in and for the Northern District of California, against certain defendants herein, pursuant to the anti-trust laws of the United States, and which action was entitled "In the District Court of the United States, for the Northern District of California, Southern Division, United States of America, Plaintiff, versus Borax Consolidated, Ltd., Pacific Coast Borax Company; United States Borax Company; American Potash & Chemical Corporation; Borax & Chemicals, Ltd.; Three Elephant Borax Corporation; Goldfields American Development Company; F. A. Lesser; James Gerstley; Frank M. Jenifer; James M. Gerstley; Frank T. Winters; C. R. Dudley; F. C. Baker; William J. Hatchley; Frederick Viewig; W. J. Murphy; Robert M. Curts, Defendants, Civil Action No. 23690-G, and at said time and on or about the 14th day of September, 1944, secured an indictment for violation of said anti-trust laws against said Borax Consolidated, Ltd., said Pacific Coast Borax Company, said United States Borax Company, said American Potash & Chemical Corporation, Borax & Chemicals, Ltd., and other defendants, which indictment was filed in the said United States District Court, for the Northern District of California, Southern Division, on the 14th day of September, 1944, and is numbered 28900-S, all as hereinabove in this complaint alleged.

90. That had plaintiffs known of or discovered, or could have discovered, that said conspiracy existed, they would not have made or entered into said agreement of August, 1934, nor said new lease of September 17, 1934, both hereinabove referred to, nor would they have made or entered into said sales and agreements of December, 1942.

91. That said "General Conspiracy" was a fraud upon plaintiffs and each of them, and was at the time of its said formation and continually thereafter intended as and for the purpose of destroying said plaintiffs and each of them and their and each of their businesses and business, as herein in this complaint set forth, and continued with such fraud and with such intent against and upon plaintiffs, and each of them, until the discovery of

said conspiracy as aforesaid by said plaintiffs; that said "General Conspiracy" was fraudulently concealed by said defendants from plaintiffs and each of them until the time of discovery thereof as aforesaid by plaintiffs.

92. That all of the above acts done and performed by defendants, or some of them, have been pursuant to and in furtherance of said "General Conspiracy," plan and combination hereinbefore in this complaint set forth and described, and with the intent and purpose of controlling and dominating throughout the world and in interstate commerce the mining, production and sale of borax, and with the intent and purpose of destroying plaintiffs' activities, as herein set forth, and removing plaintiffs, and each of them, as a competitor of defendants, or some of them, in the said mining, production and sale of borax.

93. That said "General Conspiracy" complained of and hereinbefore set forth in this complaint, was a continuing conspiracy, and each separate thing and act alleged herein and performed by the defendants, or some of them, or any of them, have been, and were, acts, things and combinations contributing to and forming a part and overt act of said continuing conspiracy.

94. That due to said intents, purposes and acts of said defendants, or each of some of them, as herein set forth, plaintiffs have been damaged in the sum of Five Million Dollars (\$5,000,000), no part of which has been paid to plaintiffs or any of them, except the sum of Five Hundred Thousand Dollars (\$500,000).

The allegations of the foregoing paragraphs, all admitted by appellees, completely refute the statement contained in the decision of the lower court to the effect that "The instant complaint fails to affirmatively allege any injuries suffered by reason of the defendants' alleged violations of the anti-trust law" (R. 620); also, the statement that "There is no allegation of damages suffered or injuries received by the plaintiffs." (R. 620). To the contrary, the complaint shows that appellants walked into a trap, the character of which, its purpose, and by whom set were not disclosed until long afterward. A conspiracy is always a conspiracy to do something; that something is the

thing which gives legal character—here it is to commit a fraud and to destroy appellants financially. Here, the complaint tells the story—the history and background of the borax industry—the desire and plan of appellees to secure the control thereof—the activities and endeavors of appellants to engage in such operations—the plan and conspiracy of appellees to destroy appellants financially and to eliminate them from any activity or competition in the borax industry—the acts used and performed by appellees pursuant to such interest and conspiracy—the extent and nature of the injuries suffered by appellants as a result of such activities and the damages suffered by them. It would be difficult to find in any reported case of treble damage actions under the Antitrust laws a more vicious, venal and fraudulent course of conduct than that set forth in the present complaint, all of which, may it please Your Honors, appellees have the audacity and abandon to admit. Honorable and decent business men if charged with the acts herein presented against them would rush to their defense with denials of such charges instead of indulging in legal quibbles and objections, even though the law does give them to right so to do. They are willing to be charged with anything, no matter how corrupt or wicked, and to admit the same if they can escape by hiding in the technical robes that sometimes are worn by Justice.

MOTIONS OF DEFENDANTS TO DISMISS AND FOR SUMMARY JUDGMENT

To the complaint, the appellees all filed motions to dismiss and for summary judgment, that of American Potash & Chemical Corporation appearing at R. 441-445. Similar motions of appellee Pacific Borax Company, Borax Consolidated, Ltd., United States Borax Company, Frank M. Jenifer and James M. Gerstley appear in the Record at pages 452-461. Like motions of appellee West End Chemical Company appear in the record at pages 461, et seq. Appellee Stauffer Chemical Company filed like motions. Attached to the motions of appellee Pacific Coast Borax Com-

pany and others are long affidavits of various parties, together with photostatic copies of various documents. All of such motions also plead the Statute of Limitations—Sec. 338 of the California Code of Civil Procedure, subdivision 4 thereof, also subdivision 1 of Sec. 338 of such Code of Civil Procedure.

To these various affidavits and exhibits, appellants filed reply affidavits of Frank Buren (R. 602), Paul O. Tobeler (R. 466) and Frank Buren (R. 570).

The cause was heard on such complaint, such motions and the affidavits attached thereto, and after voluminous briefs and oral argument, the matter was submitted to the Court, which, on November 22, 1948, granted the motions of appellees to dismiss and ordered "that the motion of the defendants to dismiss the complaint for failure to state a claim upon which relief may be granted be and the same hereby is Granted and said complaint is hereby Dismissed." This order and judgment was filed in the office of the Clerk on November 22, 1948 and entered in the Civil Docket, November 24, 1948 (R. 621), thus giving it the effect of a judgment. Subsequent thereto, and on December 2, 1948, appellants filed a motion for an order altering or amending the judgment of dismissal theretofore filed upon the 22nd day of November, 1948, by striking therefrom the last two paragraphs of said judgment and inserting in lieu thereof the following (R. 621-622):

"It is hereby ordered that plaintiffs above named, may, if they so elect, move this Court for an order permitting them to amend their complaint on file herein, said motion, if any, to be made on or before ten (10) days from the date of this order permitting the filing of such motion to amend."

Under date of December 17, 1948, the lower court made its order denying the motion to amend or alter judgment, in the following order (R. 623):

"It is Ordered that the plaintiffs' motion to amend or alter the judgment entered herein on November 24, 1948, be and the same hereby is Denied."

SPECIFICATION OF ERRORS

Statement of Points upon Which Appellants Intend to Rely on the Appeal Taken from the Order Granting the Motion to Dismiss and from the Judgment Entered in the Above Entitled Action, and from the Order Denying the Motion of Plaintiffs to Amend or Alter the Judgment Entered. (R. 629-632)

"Now come plaintiffs above named and, pursuant to the Federal Rules of Civil Procedure, set forth a statement of the points upon which appellants intend to rely upon appeal, as follows:

1. The District Court erred in granting the motions of appellees, above named, to dismiss the complaint of appellants as amended, and which order was filed herein upon the 22nd day of November, 1948.

2. The District Court erred in granting the motion of said appellees for a summary judgment, and which order was filed herein upon the 22nd day of November, 1948.

3. The District Court erred in making its order filed herein on November 22, 1948 and dismissing the complaint of plaintiffs and appellants for failure to state a claim upon which relief may be granted.

4. The District Court erred in making its order denying the motion of plaintiffs and appellants to amend or alter the judgment entered herein, and which order denying said motion was filed herein on December 17, 1948.

5. The District Court erred in failing to deny the motions of defendants and appellees, and each of them, to dismiss and for summary judgment and filed herein by said appellees, and each of them.

6. The District Court erred in the following particulars:
In holding:

(a) That this is an action at law.

(b) That this is not a suit in equity.

(c) That the State Statute of Limitations applies.

(d) That the damages alleged are the gravamen of the action and not the conspiracy.

(e) That the conspiracy charged upon is not the gravamen of the action.

(f) That the Statute of Limitations runs from the date when the injury was inflicted and the damages suffered.

(g) That the Statute of Limitations does not run from the last overt act performed pursuant to the conspiracy.

(h) That fraud upon appellants was not shown on the face of the complaint.

(i) That the allegations of the complaint, not specifically denied by appellees, were not admitted by them and, therefore, do not stand as admitted facts against them.

(j) In failing to hold that upon this motion to dismiss and for summary judgment, the allegations of the complaint properly pleaded stand admitted by appellees.

(k) That the Record establishes the fact that appellants knew, or had reason to believe, that the acts of appellees which caused the claimed damages were a violation of the Anti-Trust Laws.

(l) That "belief" or "suspicion" on the part of appellants constituted discovery or knowledge.

(m) That the complaint herein fails to allege affirmatively any injuries suffered by appellants by reason of appellees' violations of the Anti-Trust Laws.

(n) That in every transaction with appellees, the appellants received consideration or any adjudication of their rights by a court having jurisdiction.

(o) That on the face of the complaint, the price received by appellants does not appear to be inadequate consideration, and further, that the complaint fails to show affirmatively injuries to appellants' business or property for any of the transactions or events delineated.

(p) In failing to hold that the conspiracy charged was a continuing conspiracy.

(q) In failing to hold that the moratorium of 1942 and the extensions thereof tolled the statute of limitations pleaded by appellees.

(r) In failing to find that the cause of action alleged in the complaint, or some part thereof, was not barred by the Statute of Limitations.

(s) In failing to hold that the complaint on its face showed that appellees were guilty of fraud and the concealment thereof, against and from appellants.

7. The District Court erred in not granting appellants' motion to amend or alter the judgment ordered and/or entered herein upon the 22nd day of November, 1948, in the manner requested by appellants.

8. The District Court erred in granting judgment for appellees in accordance with the Judgment entered herein on the 20th day of December, 1948.

9. All of the points in the foregoing statement apply to all, each and every of the appeals referred to in the Notice of Appeal heretofore filed by appellants herein on the 20th day of December, 1948."

A statement of points to be relied upon by appellants and designation of parts of Record to be printed, was filed in the United States Court of Appeals on January 26, 1949, and is as follows (R. 669-671):

"Appellants adopt as the statement of points upon which they intend to rely upon this appeal, the Statement of Points filed by them in the above-entitled action in the United States District Court, for the Northern District of California, Southern Division, upon December 21, 1948, and in addition thereto designate the following points:

"10. All statutes of limitations urged by appellees herein were tolled by the Act of the 77th Congress, 2nd Session, Chapter 589, 56 Stat. 781 and adopted upon October 10, 1942, and which Act was subsequently and upon the 30th day of July, 1945, extended to the 30th day of July, 1946.

"11. That if the said Moratorium Act referred to hereinabove did not apply to all of the damages claimed and to the overt acts of appellees, all as alleged in the complaint on file herein, it did apply to the overt acts surrounding the sale of December, 1942, referred to in the complaint on file herein.

"And appellants designate that there be printed the following parts of the Record now on file herein, to-wit:

Complaint

First Amendment to Complaint

Affidavit of Paul O. Tobeler and 17 Exhibits

Affidavit of Frank Buren in Opposition to Motion to Dismiss

Supplemental Affidavit of Frank Buren in Opposition to Motion to Dismiss

Memorandum Opinion

Notice of Motion to Alter or Amend Judgment of Dismissal Heretofore Entered Herein upon November 22, 1948

Order Denying Motion to Amend or Alter Judgment

Notice of Appeal

Cost Bond on Appeal

Statement of Points upon Which Appellants Intend to Rely on Appeal

Designation by Appellants of Contents of Record on Appeal

This Statement of Points and Designation."

ADMISSIONS OF APPELLEES

On the Record, appellees, among other admissions, have admitted the following:

1. The historical background of the borax industry as alleged in the complaint.

2. That appellees, up to 1944, were engaged in the conspiracies and combinations charged, and pursuant thereto committed the offenses charged in paragraphs 64, 65 and 66 of the complaint and hereinabove set forth. The admissions of these facts are sufficient in themselves to condemn appellees and convict them of the charges made against them by appellants. They admit the allegation of paragraph 64 that they monopolized the industry in violation of the Anti-Trust Law, and that, pursuant to such violation, did the things and performed the acts set forth in paragraph 65.

3. They admit the formation of the 1929 agreement and conspiracy (paragraph 69 as amended), and the extension and continuations thereof as charged, as well as the purpose of such agreement to eliminate competition and destroy those in competition with them, including appellants.

4. They admit the allegations of paragraph 70, 71, 72, and 73 as amended. Paragraph 73 as amended charges directly:

73. That as a part of said 1929 agreement, said defendants agreed specifically among themselves to destroy and

eliminate the said John K. Suckow and each and all of his companies and associates from all operations of every kind and involving the production, distribution or sale of borax or any of its products.

These admitted activities on the part of the appellees constituted a fraud upon Suckow and his associates, for a conspiracy to destroy an individual is a fraud upon him.

5. They admit that as early as 1918-1922, they were committing frauds upon Dr. Suckow and concealing from him their discovery of sodium borate—the more valuable of the minerals involved—and which information they were bound to disclose to Dr. Suckow; paragraph 79 of the complaint relates in particularity the commencement of activities between Suckow and certain of the appellees during the period involved. Paragraph 80 sets forth an agreement entered into between certain of the appellees and Suckow who were jointly engaged in certain operations; pursuant thereto, certain drilling was carried on by certain appellees upon a portion of the property and formed the basis of certain patents which were obtained in the name of the appellees in question. Then paragraph 80 goes on to allege:

All of said patents were obtained on the discovery of colemanite by drilling, *and it was not known to said Suckow,—and the fact thereof was concealed by defendants from said Suckow at said time—that more valuable deposits of sodium borate actually underlaid the colemanite.*

This fraud stands admitted by appellees and confirms the charge made by appellants of the fraudulent intents and activities of appellees throughout the complaint and the period covered thereby.

6. They admit the allegations of paragraph 82 and of their activities to destroy the Gembo contracts secured by Suckow for the sale of borax in Europe.

7. Next they admit the performance of all of the overt acts set forth and charged in paragraph 83 and to which paragraph

and the overt acts set forth therein we respectfully refer and request the attention of this Court thereto. We respectfully submit that the charges in such paragraph set forth make the blood of any honest American citizen endeavoring to carry on his individual business operations, boil with indignation and resentment—particularly is this so of the allegations of subdivision (c) of such paragraph 83, wherein is set forth the story of the petition for involuntary bankruptcy—engineered by certain of the appellees against Dr. Suckow's company. These allegations, all admitted by appellees for the purposes of their motions, followed by the allegations of the remaining subdivisions of paragraph 83, are enough in themselves to prove the many frauds of appellees and their violation of the Anti-Trust Laws and the charge of appellants that by reason thereof they were damaged and practically eliminated from their borax operations.

8. They admit the allegations of paragraph 84 that due to such bankruptcy proceedings and their other activities, Suckow and his company were destroyed financially and left without means or opportunity further to engage in the borax business or any of its activities, and as a result and by reason thereof, Suckow was forced and compelled eventually to make and enter into the so-called Settlement Agreement of August, 1934, referred to in such paragraph 84, and by which Suckow was forced to give up valuable interests he then possessed.

9. In such paragraph 84, appellants allege that neither Suckow nor his company would have made or entered into such agreement of August, 1934, except for the desperate financial condition in which they found themselves as a result of the activities of appellees and as set forth in such paragraph; they further admit that at the time of making said agreement of August, 1934, neither the appellants nor Suckow had any knowledge of the said "General Conspiracy" of 1929 or of the violation by appellees of the Anti-Trust Law, and further admit the allegations of paragraph 90 of the complaint, as follows:

90. That had plaintiffs known or discovered, or could

have discovered, that said conspiracy existed, they would not have made or entered into said agreement of August, 1934, nor said new lease of September 17, 1934, both hereinabove referred to, nor would they have made or entered into said sales and agreements of December, 1942.

10. Commencing with paragraph 88, appellees admit that between the years 1939 and 1942, they threatened or charged, and did, among other things, the acts set forth in subdivisions (a) to (e) of paragraph 88 of the complaint, to which we respectfully refer, and which led up to the sale by the Suckows in 1942 referred to in subdivision (2) of said paragraph.

11. They admit the allegations of paragraph 93 to the effect that the "General Conspiracy" was a continuing conspiracy and that all of the acts of appellees, and alleged in the complaint, contributed to and formed a part of such continuing conspiracy.

12. They also admit the allegations of paragraph 94 that due to such activities on their part, appellants have been damaged in the sum of Five Million Dollars, no part of which has been paid.

In the face of such admissions as to damages, it is difficult to understand how the lower court could have held that, "There is no allegation of damages suffered or injuries received by the plaintiffs" (R. 620), or that, "The instant complaint fails to affirmatively allege any injuries suffered by reason of the defendants' alleged violation of the Anti-Trust Law." (R. 620).

In view of the foregoing, and the allegations of the complaint referred to and described hereinabove and the Overt Acts particularly set forth—all admitted by appellees—it is also difficult to ascertain what the lower court meant when it stated in its decision (R. 620):

"A mere claim of damages by reason of the existence of a conspiracy is not sufficient to state a cause of action, for a plaintiff must have received some injury in order to be able to sue under the Anti-Trust Laws. *Gibbs v. McNeeley*, 102 F. 594; *Noyes v. Parson*, 245 F. 689."

Here, there is not only *claim* for damages, but an *admission* thereof upon the part of appellees.

As a matter of fact, the lower court seemed to lose all sight of the admissions made by appellees of the allegations of the complaint and passed on the questions presented as a trial court would have done had the cause been actually tried on the merits. Also, as we shall elsewhere show, the lower court overlooked entirely the fact that upon a Motion to Dismiss or for a Summary Judgment, *facts* cannot be tried, and that as soon as it appears on the hearing of such motions that the questions presented by such motions involve *facts*, it is the duty of the hearing court to deny immediately such motions. *Sprague v. Vogt*, 150 F.(2) 795 (8th Cir.), particularly page 800; also,

Detsch & Co. v. American Products Co., 152 F.(2) 473 (9th Cir.), Sub. 6.

ARGUMENT

I.

We shall first discuss the following designations of error under this heading I of the Argument:

1. The District Court erred in granting the motions of appellees, above named, to dismiss the complaint of appellants as amended, and which order was filed herein upon the 22nd day of November, 1948.

2. The District Court erred in granting the motion of said appellees for a summary judgment, and which order was filed herein upon the 22nd day of November, 1948.

3. The District Court erred in making its order filed herein on November 22, 1948, and dismissing the complaint of plaintiffs and appellants for failure to state a claim upon which relief may be granted.

5. The District Court erred in failing to deny the motions of defendants and appellees, and each of them, to dismiss and for summary judgment and filed herein by said appellees and each of them.

A. THE COMPLAINT STATED A CAUSE OF ACTION FOR VIOLATION OF THE ANTI-TRUST LAW.

Section 1 of Title 15 provides in part as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Section 2 provides in part as follows:

"Every person who shall monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

The facts set forth in the complaint describe the combinations and conspiracies that existed and which were prohibited by both sections quoted above. Not only are the activities of appellees described as combinations and conspiracies, but specific facts are set forth which in themselves prove the combinations and the conspiracies and the intent of appellees to violate the law.

It will be recalled that, for the purposes of this action and the present proceeding, such allegations are admitted by appellees.

Section 15 of 15 U.S.C. is the provision which gives to appellants their cause of action by reason of such violations and activities by and on the part of the appellees. Such section provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold damages by him sustained, and the costs of suit, including reasonable attorneys' fee."

Again, the complaint alleges facts and specific instances demonstrating that appellants are brought within such section

15 by the activities of appellees. They show the injuries suffered by appellants as a result of appellees' activities, and which allegations and injuries are admitted by appellees.

It is submitted that the complaint is sufficient and within the rules laid down in the following cases, to wit:

Stevens Co. v. Foster & Kleiser, Etc., 311 U.S. 255, 61 S.Ct. 210.

This was a triple damage action for violation of the antitrust law. The question of the sufficiency of the complaint arose, and on page 261 of the Official Report, the court said:

"The complaint adequately charges a conspiracy to restrain the transportation of posters in interstate commerce, in aid of the attempted monopoly. It also charges other means and acts, local in character, with the same aim. The conspiracy, with its effect on interstate commerce, is alleged to have caused the petitioner great expense and loss of profits; to have restrained and prevented petitioner from establishing a business in San Francisco, 'all to the great injury and damage of plaintiff.' The pleading further alleges that the respondents' acts were injurious to the petitioner, excluded petitioner from fair competition, and charges that because of petitioner's inability to compete with respondents, petitioner 'has been damaged in that its business was rendered unprofitable, and the profits of its said trade and commerce have diminished, and the plaintiff company has suffered loss and been damaged thereby.'

"While these allegations are general, we cannot say that they are inadequate nor are we able to agree with the court below that they are coupled with and treated solely as the consequence of local activities of the respondents."

In *Publicity Building, Etc. v. Hannegan*, 139 F.(2) 583 (Eighth Cir.), the court said:

"A motion to dismiss a complaint should not be granted unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim."

"Federal Rules of Civil Procedure do not sanction disposition of doubtful issues of fact or law upon motions to dismiss for insufficiency of pleadings, but the Rules contemplate a determination of all such issues by district court after a hearing. Federal Rules of Civil Procedure, rule 1 et seq., 28 U.S.C.A. following section 723c."

On pages 586 and 587 the court discusses these questions in detail.

In *United States v. Standard Oil, Etc.*, 7 F.R.D. 338 (S.D. Cal.), Judge Yankwich stated (p. 340) as follows:

"The courts have always recognized the difficulty in actions of the character here, inherent in the nature of the case, in setting forth in precise detail the acts constituting the alleged violations of the anti-trust laws. Loewe v. Lawlor, 208 U.S. 274, 28 S.Ct. 301, 52 L.Ed. 488, 13 Ann. Cas. 815; Swift & Co. v. United States, 196 U.S. 375, 395, 396, 25 S.Ct. 276, 279, 49 L.Ed. 518; Buckeye Powder Co. v. E. I. Du Pont de Nemours Co., D.C., 196 F. 514. And since the adoption of the Rules of Civil Procedure, the cases require of the pleader only a plain and simple statement of his case in conformity to Rule 8(a), 28 U.S.C.A. following section 723c. It is not necessary to set out in detail the acts complained of nor the circumstances from which the pleader draws his conclusions that violations of the acts of Congress have occurred and the pleader has been damaged." (Emphasis added).

We respectfully submit that the foregoing refutes completely the suggestions of the lower court that the complaint here does not state a cause of action.

- B. THE MOTIONS FILED BY APPELLEES AND THE AFFIDAVITS ACCOMPANYING THE SAME AND PRESENTED IN SUPPORT THEREOF RAISE QUESTIONS OF FACT WHICH UPON BECOMING APPARENT REQUIRED THE LOWER COURT TO DENY SUCH MOTIONS AND AFTER THE FILING OF ANSWERS BY APPELLEES TO SET THE CAUSE FOR TRIAL UPON THE MERITS. INSTEAD OF SO RULING AS REQUIRED BY THE AUTHORITIES HEREINAFTER SET FORTH, THE LOWER COURT PRESUMED TO RULE AND PASS UPON THE QUESTIONS OF FACT RAISED BY SUCH AFFIDAVITS ACCOMPANYING THE MOTIONS TO DISMISS AND THE COMPLAINT AND AFFIDAVITS OF APPELLEES.**

**The Motions to Dismiss Admitted All of the Allegations
of the Complaint Well Pledged**

Purity Cheese Co. v. Frank Ryser Co., 153 F.(2), 88 (7th Cir.);
United States v. Frankfort, Etc., 324 U.S. 293, 65 S.Ct. 661;
Ansehl v. Puritan, Etc., 61 F.(2), 131 (8th Cir.);
Ledbetter v. Farmers, Etc., 142 F.(2) 147 (4th Cir.),
 Cert. den., 323 U.S. 719;
Willson v. Graphol Products Co., 165 F.(2) 446.

Furthermore, affidavits filed in support of a motion to dismiss or for summary judgment, cannot be used to contradict the allegations of the complaint.

Domestic & Foreign Commerce Corp. v. Littlejohn,
 (D.C. Cir.), 165 F.(2), 235, at 237;
Michel v. Meier, 8 F.R.D. 464;
Frederick Hart & Co. v. Recordgraph Corp., (Third Cir.),
 169 F.(2), 580.

In such case the Court stated (p. 581):

"We are of the opinion that the District Court erred. It is well-settled that on motions to dismiss and for summary judgment, affidavits filed in their support may be considered for the purpose of *ascertaining whether an issue of fact is presented, but they cannot be used as a basis for deciding the fact issue.* An affidavit cannot be treated, for purposes of the motion to dismiss, as proof contradictory to

well-pleaded facts in the complaint. Farrall v. District of Columbia Amateur Athletic Union, 1946, 80 U.S. App. D.C. 396, 153 F.2d 647; United States v. Association of American Railroads, D.C. Neb. 1945, 4 F.R.D. 510; 2 Moore's Federal Practice (2nd ed. 1948) pages 2254, 2255."

Appellees' affidavits in support of the motions to dismiss and for summary judgment allege that the action was barred by the Statute of Limitations, and also that the causes of action were settled and released. See motions to dismiss, R. 452, et seq. The affidavits and purported releases (R. 459) filed in connection with such motions attempt to set forth facts which appellees claim demonstrate that appellants had knowledge of these activities of appellees, as set forth and admitted, long prior to the commencement of this action. (Affidavit of Moses Lasky and exhibits attached, R. 130; also affidavit of Ashburn, R. 83, and affidavit of Bargion, R. 100). To these, appellants filed the affidavit of Frank Buren (R. 570 and 602) and of Paul O. Tobeler (R. 46). To all of these affidavits were attached exhibits forming a part of the same.

Appellants allege in paragraphs 89 to 90, inclusive (R. 75-77), that they had no knowledge of such General Conspiracy or that the activities of appellees—and alleged in the complaint—were a part of and due to such General Conspiracy, until the fall of 1944 when the Government secured its indictment and brought its action, and that they would not have entered into the agreement of August, 1934, nor the sales agreement of December, 1942, had they known that the acts charged in the complaint were a part of and due to such General Conspiracy. It was with the idea of denying such allegations of appellants that the exhibits were attached to the motions to dismiss and for summary judgment. By reason thereof, questions of fact were immediately brought into being, namely (a) whether or not appellants knew of the formation of such General Conspiracy prior to the action of the Government in 1944; (b) if so, when was such discovery made; (c) whether or not appellants would have

entered into the agreement of August, 1934, or the sale of December, 1942, had they known the facts alleged; (d) whether or not appellants were damaged by the activities of appellees, as alleged in the complaint and admitted by appellees; (e) whether or not such General Conspiracy was a fraud upon appellants, as charged in paragraph 91 (R. 77); (f) whether or not such General Conspiracy was a continuing conspiracy, as alleged in paragraph 93 (R. 78) and admitted by appellees; (g) whether or not appellants were damaged in the manner and as a result of the activities of appellees and as alleged in paragraph 94 (R. 78); (h) and, whether or not appellants knew or became aware, prior to the fall of 1944, of the fact that appellees had become or were violators of the antitrust laws, and if so, upon what date. Such discovery was made by appellants; (i) and, when or upon what date the Statute of Limitations began to run against appellants on this present complaint or the cause of action set forth therein. See last paragraph of the *Hart* case cited *infra* (169 F.(2) 580) and appearing on p. 583 and which is on all fours with the present case.

Here, instead of denying the motions to dismiss and for summary judgment, as required by law, the lower court accepted questions of fact tendered by appellees in their motions and affidavits and passed upon certain of such questions of fact in the following particulars. In the lower court's decision (R. 619) it is stated:

"Too, *the record seems to firmly establish the fact* that plaintiffs knew, or had reason to believe, that the acts of the defendants which caused the claimed damages were a violation of the Anti-Trust Laws. Such fact precludes plaintiffs from availing themselves of this exception which would toll the statute of limitations until the alleged date of discovery in 1944." (Italics ours)

Note, please, that the lower court fails to find or state the date upon which such discovery was made by appellants and in the absence of such finding how can it be determined when the statute commenced to run?

Such quotation is a direct finding of fact as to knowledge on the part of appellants, which was derived by the court solely from the allegations of the complaint and the affidavits and exhibits of appellees. This question could only properly be presented upon a trial of the cause upon the merits. Instead, the court took the question over for its own decision, without witnesses or benefit of cross-examination or presentation of evidence by or on behalf of appellants—all contrary to the authorities hereinafter set forth.

The decision also holds (R. 619):

"Apart from such bar however, no cause of action is stated by any of the claims made by the plaintiffs, including any claim with respect to the transaction of 1942."

The bar referred to is that of the Statute of Limitations. How could the court make such a finding in the face of the admissions of appellees and without the opportunity to appellants to present evidence?

Further, at R. 620, the decision continues and states:

"The instant complaint fails to affirmatively allege any injuries suffered by reason of the defendants' alleged violations of the Anti-Trust Laws. **In every transaction with the defendants the plaintiffs have received consideration or an adjudication of their rights by a court having jurisdiction.**" (Emphasis ours)

The underlined portion of the above quotation is a direct finding of fact, as fully as though such finding was made after a trial upon the merits.

Continuing, the decision states (R. 620):

"There is no allegation of damages suffered or injuries received by the plaintiffs. **On the face of the complaint, the price received by the plaintiffs does not appear to be inadequate consideration.**"

No more complete finding of fact could be conceived than the last sentence of the foregoing quotation. On the face of the

record, how could the court possibly have made such a finding of fact?

This Court has passed directly upon such a situation in the case of *Detsch & Co. v. American Products Co.*, 152 F.(2) 473, where it was held (subdivision 6):

"In action for breach of written agency contract requiring manufacturer to 'cooperate' with agency to further sales of manufacturer's products, summary judgment dismissing complaint alleging manufacturer's breach of contemporaneous oral agreement to establish warehouses cannot be supported because of letters which at most show considerable volume of business built up by agency in manufacturer's products, that warehousing is not discussed until over a year after making of contract, and that jury may infer that warehousing agreement has not been made. Federal Rules of Civil Procedure, rule 8 (f), 28 U.S.C.A. following section 723."

The concluding sentence of the Opinion at page 475 is as follows:

"Appellant is entitled to a trial in which the witnesses, before the jury or court, if any, shall be subject to cross-examination and to the usual inferences from their demeanor and manner of testifying."

In *Sprague v. Vogt* (8th Cir.), 150 F.(2) 795, at page 800, it is held:

"This court has stated the substance and purport and effect of Rule 56 (c), F.R.C.P., in *Walling v. Fairmont Creamery Co.*, 139 F.(2d) 318, 322, as follows:

'Rule 56(c) of the Rules of Civil Procedure provides that a summary judgment shall be granted "if the pleadings, depositions and admission on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." On a motion for a summary judgment the burden of establishing the non-existence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, and his supporting affidavits and depositions,

if any, are carefully scrutinized by the court. The object of the motion is to separate the formal from the substantial issues raised by the pleadings, **and the court examines evidence on the motion, not to decide any issue of fact which may be presented, but to discover if any real issue exists.** *Toeberman, et al. v. Missouri-Kansas Pipe Line Co.*, 3 Cir., 130 F.2d 1016, 1018. When affidavits are offered in support of a motion for summary judgment, they must present admissible evidence, and must not only be made on the personal knowledge of the affiant, but must show that the affiant possesses the knowledge asserted. *When written documents are relied on, they must be exhibited in full. The statement of the substance of written instruments or of affiant's interpretation of them or of mere conclusions of law or restatements of allegations of the pleadings are not sufficient.* Rule 56(e), Rules of Civil Procedure; 3 Moore's Federal Procedure under the New Rules, p. 3175, et seq. **On an appeal from an order granting a defendant's motion for summary judgment the circuit court of appeals must give the plaintiff the benefit of every doubt.** *Ramsourer v. Midland Valley R. Co.*, D.C., 44 F. Supp. 523, 526; *Weisser et al. v. Mursan Shoe Corporation, et al.*, 2 Cir., 127 F.2d 344, 346 (145 A.L.R. 467); *McElwain v. Wickwire-Spencer Steel Co.*, 2 Cir., 126 F.2d 210.'

The rule applicable hereto was laid down by the Supreme Court in *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 64 S.Ct. 724. It is there held (at page 725):

"Federal rule providing for summary judgment was not intended to cut off right of trial by jury where there are issues to try, and summary judgment should be granted only when moving party is entitled to judgment as a matter of law, the truth is quite clear and no genuine issue remains for trial. Federal Rules of Civil Procedure, rule 56, 28 U.S.C.A., following Section 723c."

"The credibility* of witnesses and weight to be given their testimony is for jury which may exercise its independent judgment even if such testimony is uncontradicted."

The rule is so well stated in *Newark Evening News v. King Features*, 7 F.R.D., 645, that we quote subdivisions 1 and 2 of such Opinion, at pages 646 and 647. The Court stated:

"Rule 56 of the Rules of Civil Procedure, *supra*, does not vest in the court the jurisdiction to summarily try the factual issues on the pleadings and affidavits of the parties, but vests in the court the limited authority to enter summary judgment only if it clearly appears from the record that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' The complete absence of any genuine issue of fact must be apparent and all doubts thereon must be resolved against the moving party. Fishman v. Teter, 7 Cir., 133 F.2d 222; Toebelman v. Missouri-Kansas Pipe Line Co., 3 Cir., 130 F.2d 1016; McElwain v. Wickwire Spencer Steel Co., 2 Cir., 126 F.2d 210; Miller v. Miller, App. D.C., 122 F.2d 209; Whitaker v. Coleman, 5 Cir., 115 F.2d 305. See also Sarnoff v. Ciaglia, 165 F.2d 167, recently decided by the United States Circuit Court of Appeals for the Third Circuit. If it appears from the record that there is a genuine issue of fact, even though it may relate only to the credibility and the weight of the testimony, the court is without jurisdiction to enter summary judgment. Sartor v. Arkansas Gas Corporation, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967; Arnstein v. Porter, 2 Cir., 154 F.2d 464."

In

Domestic & Foreign Commerce Corp. v. Littlejohn, 165 F.2d 235,

it was said (p. 237):

"* * * The complaint was met only by a motion to dismiss supported by affidavits. It was at this stage of the contest that the lower court dismissed the complaint on the ground of lack of jurisdiction. The allegation should have been treated as admitted and therefore the motion to dismiss could be properly granted only if it were clearly apparent to the court that the plaintiff (appellant here) would not be entitled to the relief sought under any state of facts which could be proved in support of the specific claim. *Tahir Erk v. Glenn L. Martin Co.*, 4 Cir., 116 F.2d 865. *The summary nature of the hearing preceding dismissal precluded the careful consideration to which appellant was entitled.*" (Italics ours.)

Also see

Willson v. Graphol Products Co., 165 F.2d 446;

Ledbetter v. Farmers, Etc., 142 F.2d 147 (4th Cir.)

Cert. denied; 323 U.S. 719.

In the *Ledbetter* case it was held that under the Rules of Civil Procedure a motion to dismiss takes the place of the old demurrer and in considering the motion the Court must treat every properly pleaded allegation of fact in the complaint as true.

Also see *Ansehl v. Puritan, Etc.*, 61 F.2d 131 (8th Cir.).

At p. 133, Judge Sanborn states:

"Since such a motion to dismiss has taken the place of a demurrer, it is elementary that it admits all material facts well pleaded in the complaint, that only defenses in point of law appearing upon the face of the complaint may be considered, and that, unless it is clear that, taking the allegations to be true, no cause of action in equity is stated, the motion should be denied." (Citing cases).

In

United States v. Frankfort, Etc., 324 U.S. 293; 65 S.Ct. 661,

it is held that facts alleged in an indictment stand admitted on demurrer and on a plea of nolo contendere. Also see

U.S.C.A. T. 28, p. 890, Note 475.

In the instant case a reading of the whole decision of the lower court shows His Honor's determination to find on the facts himself and to leave nothing for a trial court or a jury. The court handled the case exactly as though it were being tried on its merits; as a matter of fact, not one of the cases which we have cited above is anywhere nearly as strong in its violations of such rules as to summary judgment as the decision of the lower court in this particular matter.

We respectfully submit that the lower court in ignoring completely the rules laid down above and deciding direct questions of fact on the merits thereof makes it necessary that this Court reverse the decision of such Court and send this action back for trial upon the merits.

II.

The Conspiracy Is the Gravamen of a Treble Damage Action Such as the Present

The conspiracy of appellees to violate both Sections 1 and 2 of the Antitrust Act is the *cause of action* on which appellants are proceeding, and the overt acts alleged in the complaint and performed pursuant to such conspiracy are the yardsticks which measure the right to damages suffered by appellants as a result of such conspiracy and violations of said Secs. 1 and 2 by the appellees.

The overt acts form no part of the conspiracy which, as stated, is the "cause of action."

In *Nash v. United States*, 229 U.S. 373; 33 S.Ct. 780, it was held:

"No overt act need be alleged in an indictment charging a conspiracy to restrain or monopolize interstate trade or commerce, under the antitrust act of July 2, 1890, since that statute does not make the doing of any act other than the act of conspiring a condition of liability."

Also see—*United States v. Socony, Etc.*, 310 U.S. 150; 60 S.Ct. 811, where it was held:

"Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise, is proof of the actual consummation or execution of an unlawful conspiracy in restraint of trade and commerce. Sherman Anti-Trust Act, Sec. 1, 15 U.S.C.A. Sec. 1."

See the discussion on this point on p. 219 of the Official Report.

Likewise, see *United States v. New York, Etc.* (5 Cir.), 137 F.2d 459; (Cert. denied, 320 U.S. 783); at p. 463 the Court said:

"* * * *Nash v. United States*, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232, and *United States v. Socony Vacuum Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129, settle it that the offense of conspiracy under the Sherman Act is complete when the agreement or conspiracy is formed, that jurisdiction and venue lie in the district where it was formed, and that it is not necessary to allege the commission of an overt act. It is settled, too, that a conspiracy in restraint of trade is, or may be, a continuing offense, *United States v. Kissel*, 218 U.S. 601, 31 S.Ct. 124, 54 L.Ed. 1168, and that 'A conspiracy thus continued in effect renewed during each day of its continuance,' *United States v. Borden Co.*, 308 U.S. 188, 60 S.Ct. 182, 190, 84 L.Ed. 181. As each new member later joins the conspiracy, he in effect makes the agreement then and there to become a party to it."

Also, on p. 464 the Court said:

"* * * It is not the form of the combination or the particular means used, but the result to be achieved that the statute condemns. *It is equally clear that it is of no importance whether the means used to accomplish the unlawful objective are in themselves unlawful.* Acts done to give effect to the conspiracy may be in themselves wholly innocent acts, yet if they are a part of the sum of the acts which are relied upon to effectuate the conspiracy the Sherman Act forbids, they fall within the condemnation of the statute."

In—*United States v. General Motors, Etc.*, 121 F.2d, it was said (pp. 404 and 405):

"* * * proof of the conspiracy would have been sufficient to sustain a conviction even if the conspiracy had never been carried out. This is true because the offense condemned by the Sherman law is the act of conspiring, and neither actual restraints nor overt acts need be proved. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 252, 60 S.Ct. 811, 84 L.Ed. 1129."

Also see—*United States v. Armour* (10 Cir.), 137 F.2d, at p. 271.

While the foregoing are criminal cases (which we submit are no different, so far as the rule in question is concerned, from civil actions), the same rule is applied in civil actions for treble damages.

See—*Albert Pick-Barth Co. v. Mitchell, Etc.*, 57 F.2d 96 (Cert. denied, 286 U.S. 552; 52 S.Ct. 503), which was a civil action for treble damages. On p. 102 the Court stated:

"To constitute an offense under section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate trade, to show that the public was affected, and to what extent. *Nor is it necessary under this act, as it is at common law, to prove any overt acts in order to constitute the offense defined in section 1*; but if overt acts are proved in furtherance of the offense defined in section 1, and any one is thereby injured in his business or property, the conspirators under section 7 of the Act are liable therefor."

The Pick-Barth case cites:

Chattanooga Foundry, Etc. v. Atlanta, 203 U.S. 390; 27 S.Ct. 65,

which was also a civil action and which holds that Congress "had power to give an action for damages to an individual who suffers by breach of the law." (Citing a case in support.) P. 396-397 Official Reports.

This confirms the claim expressed above: That the conspiracy formed by the appellees *constituted in itself the wrong which immediately gave to appellants their cause of action*. This holding demonstrates the distinction between the cause of action (the conspiracy) and the damages suffered by appellants as a result thereof (the overt acts), thus confirming the statement that a cause of action and overt acts are separate and distinct.

This point is very important so far as the statute of limitations is concerned. We earnestly contend, and the cases so

hold, as we shall hereafter show, that in a case of fraud or concealment, such as the present, the statute of limitations does not begin to run until the discovery of the *cause of action*, which here is the 1929 Conspiracy.

In the opinion of the lower court (R. 618), it is stated:

"All of the cases cited by the plaintiffs as upholding their contention that the existence of a conspiracy is in itself sufficient basis for a cause of action are cases of criminal prosecution by the government."

Such statement is not the fact as is shown clearly by the *Pick* case; therefore, until appellants discovered the existence of the '29 conspiracy at the time the Government commenced its actions (September, 1944), the statute of limitations did not commence to run on the cause of action (the conspiracy), and the complaint herein being filed within three years thereafter according to the moratorium on the statute hereinafter referred to, the plea of the statute was not available to these appellees. All of the questions of fact referred to in the foregoing statement stand admitted by the appellees on these motions.

III.

In a Situation Such as the Present Where There Have Been Continuing Overt Acts, the Statute of Limitations Does Not Begin to Run Until the Performance of the Last Overt Act Performed Pursuant to the Conspiracy.

In *Fiswick v. United States*, 329 U.S. 211; 67 S.Ct. 224 (p. 216 of the Official Report), it is held:

"The statute of limitations, unless suspended, *runs from the last overt act during the existence of the conspiracy*. *Brown v. Elliott*, 225 U.S. 392, 401, 32 S.Ct. 812, 815, 56 L.Ed. 1136. The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy."

The *Fiswick* case cites

Brown v. Elliott, 225 U.S. 392; 32 S.Ct. 812.

On p. 815 of the Supreme Court Rep. the Court said:

"In *Lonebaugh v. United States*, 103 C.C.A. 56, 179 Fed. 476, the circuit court of appeals of the eighth circuit considered the relation of the overt acts to the conspiracy and their effect in determining the application of the statute of limitations. The court said, by Mr. Justice Van Devanter, then circuit judge: 'While the gravamen of the offense is the conspiracy, the terms of sec. 5440 (U.S. Comp. Stat. 1901, p. 3676), are such that there also must be an overt act to make the offense complete (*Hyde v. Shine*, 199 U.S. 62, 76, 50 L.Ed. 90, 94, 25 Sup. Ct. Rep. 760); and so the period of limitations must be computed from the date of the overt act rather than the formation of the conspiracy. And where, during the existence of the conspiracy there are successive overt acts, **the period of limitation must be computed from the date of the last of them of which there is an appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found.** (Citing cases)'."

Here the last overt act was the sale of December, 1942, described in Paragraph 88, particularly Subdivision (e) of the complaint (R. 73). The subdivisions and paragraphs immediately preceding and those immediately following such Suddv. (e) set forth in detail further facts surrounding the existence and performance of such overt act. Please remember that all of such allegations of the complaint are admitted by appellees on the motions to dismiss and for summary judgment. While December, 1942, was more than three years prior to the commencement of this action, the period of time from June 1942 to June 1946 was tolled by the Act of Congress known generally as the Moratorium Act and discussed in the succeeding subdivision of this brief.

**The Moratorium Act of 1942, and the Amendments Thereto,
Tolled the Statute of Limitations Until June 30, 1946**

In October, 1942, Congress passed an Act providing for the suspension of the statute of limitations in all actions for violations of the Antitrust laws of the United States. That Act, together with the amendments and extensions thereto, provided as follows:

Act, October 10, 1942, Ch. 589, 56 Stat. 781, provided:

"Sec. 1. The running of any existing statute of limitations applicable to violations of the antitrust laws of the United States, *now indictable or subject to civil proceedings under any existing statutes*, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

"Sec. 2. That this Act shall be in force and effect from and after the date of its passage."

As of June 30, 1945 the above moratorium was extended until June 30, 1946.

Ch. 213, Public Law 107, U. S. Code Congressional Service, 79th Congress, First Session 1945:

**"CHAPTER 213—PUBLIC LAW 107
(S. 937)**

"An Act to amend the Act suspending until June 30, 1945, the running of the statute of limitations applicable to violations of the antitrust laws, so as to continue such suspension until June 30, 1946.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

"The first section of the Act entitled 'An Act to suspend until June 30, 1945, the running of the statute

of limitations applicable to violations of the antitrust laws,' approved October 10, 1942 (56 Stat. 781; U.S.C., Supp. III, title 15, note following sec. 16), is amended by striking out the date 'June 30, 1945' where it appears in such section and inserting in lieu thereof the date 'June 30, 1946.'

"Approved June 30, 1945."

Applying these suspension statutes to the present situation: The second release was given December 21, 1942 (R. 73)—two months after passage of the Second Moratorium Act which extended the date of June 30, 1945, to *June 30, 1946*. The second release (Dec. 1942, R. 73) constituted an overt act in the conspiracy of 1929. The complaint herein was filed September 11, 1947. Three years from December 21, 1942 would be December 21, 1945, at which time the suspension of the statute was in effect. The complaint was filed approximately one year and three months after the end of the moratorium on June 30, 1946. Therefore, irrespective of whether or not the statute was tolled by fraud and concealment, which we earnestly contend was the fact, the last overt act, viz., the release of 1942, was well within the three-year period preceding the filing of the complaint and thus the statute is not applicable hereto. In making such statements we do not waive our claims that the statute was tolled by the fraud and concealment of appellees, or that the conspiracy was a continuing conspiracy or that the statute runs from the last of a series of overt acts.

The Conspiracy of 1929, Charged in the Complaint, Was a Continuing Conspiracy, and Neither the Statute of Limitations Nor the Application of Laches Commenced to Run Until the Completion of the Last Overt Act Performed Pursuant to Such Conspiracy, and Which Was the Settlement Agreement of December 1942.

This was definitely decided in

United States v. Kissel, 218 U.S. 601, L.Ed. 1168.

This was an antitrust case and is controlling in appellant's favor.

There it was held:

"2. A conspiracy to restrain or monopolize trade, in violations of the Sherman Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U.S. Comp. Stat. 1901, p. 3200), by obtaining control of a competitor through a pledge of the majority of its stock to secure a loan to a stockholder, and then voting to suspend business until further order of the board of directors, continues, so far as the statute of limitations is concerned, so long as any further action is taken in furtherance of the conspiracy."

The true rule was set forth by Justice Holmes on page 607, where he states:

"The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfied the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States v. Irving*, 98 U.S. 450, 25 L.Ed. 193, 3 Am. Crim. Rep. 334. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than

to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act."

Also see page 610, where the Court further stated:

"To sum up and repeat: The indictment charges a continuing conspiracy. Whether it does so with technical sufficiency it not before us. All that we decide is that a conspiracy may have continuance in time, and that where, as here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue, and not by a special plea. Under the general issue all defenses, including the defense that the conspiracy was ended by success, abandonment, or otherwise, more than three years before July 1, 1909, will be open and unaffected by what we now decide."

In the case of *Brown v. Elliott*, 225 U.S. 392, 32 S.Ct. 812 at p. 819, the following statement there made is most applicable to the present situation. There it was said, in part:

"Where, during the existence of the conspiracy, there are successive overt acts, *the period of limitation must be computed from the date of the last of them of which*

there is an appropriate allegation and proof, and this, although the earlier acts may have occurred more than three years before the indictment was found.

In the following cases similar statements were made:

Braverman v. United States, 125 Fed.2d 283, at page 287:

"A conspiracy continues insofar as the statute of limitations is concerned, so long as there is a course of conduct in violation of law to effectuate its purpose."

Hedderly v. United States, 193 Fed. 561 (Ninth Circuit); at page 569:

"Where the conspiracy contemplates various overt acts and the consequent continuance of the conspiracy beyond the commission of the first act, each overt act thereafter gives a new, separate, and distinct effect to the conspiracy, and constitutes another agreement, so that a prosecution is not barred by the statute of limitations until three years after the commission of *the last overt act alleged and proved.*"

United States v. McWilliams, 54 Fed. Supp. 791, at page 794:

"The indictment clearly charges a continuing conspiracy. * * * True enough it is well settled that as to conspiracies under 18 U.S.C.A., Sec. 88, which do not become crimes until an overt act has occurred, the statute of limitations starts to run from the date of the last overt act, each succeeding overt act, if more than one, being considered the consummation of a new or revived conspiracy."

Here, the complaint shows the formation of a conspiracy and the continuing activities of the appellees thereunder. The charge of a continuing conspiracy is set forth in Paragraphs 92 (R. 77) and 93 (R. 78), the latter paragraph making the charge that each separate thing and act alleged and performed by the appellees has been and was an act, thing, or combination contributing to and forming a part of an overt act of such continuing conspiracy. The overt acts are set forth throughout the

complaint, particularly beginning with Paragraph 83 (R. 53). From then on the complaint has to do solely with the activities of appellees against appellants setting forth a statement of such activities and the various injuries inflicted by appellees upon appellants as a result of appellees' violations of the antitrust act. In Paragraph 92 (R. 77), it is charged that all of these acts were performed pursuant to and in furtherance of the general conspiracy of 1929.

We respectfully submit that the facts here presented fit in exactly with the law laid down in the case of *United States v. Kissel*, supra, and the other authorities cited supra; hence the motion to dismiss should have been denied irrespective of the question of knowledge or discovery by appellants of the 1929 conspiracy prior to September 1944. In computing the time neither the Moratorium referred to hereinabove nor the provisions of T. 15, Sec. 16, can be overlooked. The Moratorium was for four years and the time included within Sec. 16 U.S.C.A. was possibly a year, so that five years must be deducted in any computation of the statute.

Each one of the activities of appellees as set forth in the complaint constituted an overt act pursuant to the continuing conspiracy of 1929, until the last settlement in 1942. The complaint alleges (pars. 92 and 93, R. 77-78) that the 1929 conspiracy was a continuing conspiracy and that all of such acts of appellees alleged in the complaint were pursuant to the same, and on this motion such allegations stand admitted. The Moratorium heretofore referred to was in force at the time of the said last settlement in 1942, the final overt act, and did not expire until 1946 so that the statute did not commence to run until three years after the last named year.

The lower court in its decision (R. 615-616) sets forth the contentions of appellants and appellees, one of such contentions on behalf of appellants being to the effect that by reason of the Moratorium above referred to the statute was tolled. Later on in setting forth the contentions of appellees (R. 616),

the lower court states that among the contentions of appellees is one to the effect that "the Federal Moratorium statute is not applicable to suits by private parties." In spite of these two references to the Moratorium Act, the lower court failed entirely to pass upon the question of the applicability of such Moratorium and no mention of it is made in the deciding portion of such decision. The Moratorium is totally ignored and the lower court places its decision upon the applicability of the California statute of limitations (R. 621). This was a grievous error and alone calls for the reversal of this case.

VI.

The Fraud and Concealment of Appellees Set Forth in the Complaint and Admitted by Appellees Told the Statute of Limitations Until the Discovery by Appellants of Their Cause of Action Against Appellees and Which Discovery Was Made in September 1929, at the Time the Government Commenced Its Action and Secured Its Indictment Against Certain of the Appellees.

Paragraph 89 of the complaint (R. 75) alleges that none of the plaintiffs (appellants herein) had any knowledge or intimation of the general conspiracy of September 1929 until the Government secured its indictment and brought its action. It is also alleged in such paragraph that such conspiracy was at all times fraudulently and otherwise concealed from appellants. The facts set forth in such paragraph are admitted for the purposes of these motions. The facts attempted to be set up by appellees in their affidavits and exhibits accompanying their motions to dismiss and for summary judgment cannot be used to defeat the allegations of such paragraph, for to permit such defense would be contrary to the authorities cited, *supra*, and to permit the trial of questions of fact on this motion. The purpose of such affidavits of appellees is to deny the allegations of paragraph 89 to the effect that appellants had no knowledge of the conspiracy of '29 or that the activities of appellees constituted

violations of the antitrust laws. Whether or not such was the fact is a fact which must be determined on the trial of the action on the merits and cannot be passed upon as the lower Court attempted to do on such motions as are here presented. The law is, as we shall show, that in cases of fraud or concealment the statute is tolled until the discovery of the cause of action by the wronged party. Such are all questions of fact.

As alleged in Paragraph 91 (R. 77) and admitted by appellees, the general conspiracy of 1929 was a fraud upon appellants and intended as and for the purpose of destroying appellants and their businesses and was fraudulently concealed by appellees until the time of the discovery of such general conspiracy by appellants.

A conspiracy to destroy a party financially is in and of itself a fraud upon such party against whom such conspiracy is directed. That is fundamental and a statement of the rule of natural justice.

Broadly speaking fraud is defined in 37 C.J.S., at page 204, as follows:

"An act or course of deception deliberately practiced with the view of gaining a wrong or unfair advantage; deceit; trick; an artifice by which the right or interest of another is injured." (Cited in support *Eliason v. Wilborn*, 167 N.E. 101; affirmed 50 S.Ct. 382; 281 U.S. 547.)

The quotation is from the opinion of the Illinois Supreme Court, and is really a quotation from

Storey's Equity Jurisprudence, Vol. 1, Secs. 186, 187.

This case was affirmed by the Supreme Court without any discussion of the question of fraud but the affirmation of the Illinois court's decision indicated approval by the Supreme Court of such holding as to fraud.

The overt acts set forth in Paragraph 83 of the complaint (R. 53) and admitted by appellees, show without question the frauds inflicted upon and concealed from appellants by appellees; particularly so is the story of the bankruptcy proceedings com-

mening with Subdivision (c) of such paragraph (R. 55). The fraudulent acts of appellees and committed to bring about such proceedings, were, we submit, vicious and sufficient in themselves to warrant the relief sought herein. When added to the other activities charged in the complaint and admitted by appellees they definitely show the fraud and concealment necessary to toll the statute until the discovery in September 1944 of the reason and cause for all of such wrongs, namely, the conspiracy to destroy appellants and formed in September 1929. Any references during the intervening years and made by appellants to appellees as violators of the antitrust law are of no moment as against the allegations of the complaint to the effect that appellants had no knowledge of their cause of action (conspiracy of '29) until the time of the institution of the Government actions. Such allegations of appellants are admitted for the purpose of these motions and the truth thereof cannot be tried out on the hearing of the same. They are all questions of fact which call for a trial on the merits. Furthermore, *mere suspicion*, or even *belief*, in the existence of facts not definitely *known* does not constitute discovery or knowledge nor is it sufficient to start the running of the statute. Such is the ruling of this Court.

See *Fleishacker v. Blum*, 109 F.2d, 543. On p. 548, the Court said:

"The applicable statute (Cal. Code of Civil Proc. Sec. 338, sub. 4) provides that an action for relief on the ground of fraud or mistake must be brought within three years, but that 'the cause of action in such case (is) not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.' The aggrieved party in this case is the Bank. (Citing cases). The trial court, however, made no finding as to the time the Bank discovered the fraud. It found only that the plaintiff stockholders did not discover it until less than three years before the commencement of the action.

* * * * *

"We are satisfied that the proof is such as to require a finding that the Bank did not discover the fraud until appellees brought it to light by their investigations. Hence the action is not barred as to the Bank.

"The word '*discovery*', as used in the statute, *means actual knowledge*, or knowledge of facts which, in the exercise of due diligence, would have led to an actual discovery of the fraud. *Consolidated Reservoir & Power Co. v. Scarborough*, 216 Cal. 698, 701, 703, 16 P.2d 268; *Lady Washington etc. Co. v. Wood*, 113 Cal. 482, 45 P. 809; *Victor Oil Co. v. Drum*, 184 Cal. 226, 240, 193 P. 243; *Prentiss v. McWhirter*, 9 Cir., 63 F.2d 712, 715."

Also see:

Kalruth v. Resort Properties, Ltd., 57 Cal. App. 2d, 146; 134 P.2d, 513.

On p. 150, the court states:

"We believe that when, as here, the buyer has only a suspicion of the fraud, and the seller who has defrauded the buyer, lulls the buyer into a sense of security by both words and conduct, the seller should not be permitted to assert that the buyer had lost his rights by waiving the suspicion and accepting the reassurance of the seller that no fraud had been perpetrated."

An important case on the question of fraud and its discovery is that of

Hansen v. Bear Film Co., Inc., 28 Cal. 2d, 154, Subs. 11 and 12.

"Where a defendant is guilty of fraudulent concealment of a cause of action, the statute of limitations is deemed not to become operative *until the aggrieved party discovers the existence of the cause of action*. (Note: Court says *cause of action*—which here is the 1929 conspiracy. This insertion is ours.)

"Where one coadministrator of a decedent's estate conceals facts from another coadministrator which would constitute a cause of action against the first administrator with respect to corporate stock transferred to said administrator

in trust for decedent, such concealment prevents the statute of limitations from running against the action during administration of the estate, *until discovery of the true facts.*" (Italics ours.)

The California law on this question of the tolling of the statute was finally settled in the case of

Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203; 30 P.2d, 39.

In that case it was held:

"Independent of statute, a fraudulent concealment by the defendant of the facts upon which a legal common-law action is based, under the proper circumstances, tolls the statute until *discovery*, at which time the statute applicable to that particular action then commences to run."

"While in actions at law plaintiff's mere ignorance of the existence of the injury, or of facts constituting such injury, or of the identity of the wrongdoer, does not toll the statute, as far as a legal action for personal injuries is concerned *the fraudulent concealment by the defendant of the facts, upon the existence of which the cause of action depends, does toll the statute, which does not begin to run until discovery by plaintiff or until by reasonable diligence the plaintiff should have discovered the facts.*"

"In this action for damages for personal injuries resulting from the negligence of a fellow employee who had been loaned by plaintiff's employer to defendant, where the complaint alleged that said employer at all times advised plaintiff that it was responsible for the accident, that defendant fraudulently agreed with said employer that if the facts were concealed from plaintiff it would pay one-half of the amount spent on plaintiff's case, and *that he had no knowledge of his cause of action until the discovery of a letter relating to said agreement, the facts pleaded were sufficient to toll the statute of limitations until such discovery.*" (Italics ours.)

The same situation is present in the case at bar, for the facts surrounding the cause of action were concealed by the defendants.

A like rule was laid down in

Pashley v. Pacific Elec. Ry. Co., 25 Cal. 2d, 226.

"A defendant having by fraud or deceit concealed material facts and by misrepresentation hindered plaintiff from bringing an action within the statutory period, is estopped from taking advantage of his own wrong. *The rule is applicable irrespective of whether the action itself be based on fraud.*" (Italics ours.)

"The statute of limitations is intended as a shield for a defendant's protection against stale claims, but he may not use it to perpetuate a fraud on otherwise diligent suitors."

"When a defendant is guilty of fraudulent concealment of a cause of action, the statute of limitations is deemed not to become operative until the aggrieved party *discovers the existence of the cause of action.* (Italics ours.)

The "point of discovery" is discussed on page 229. This case holds directly that the statute does not begin to run until the injured party discovers the *existence of the cause of action*. Here, the cause of action was the conspiracy entered into by the appellees and until that conspiracy was actually discovered by appellants neither the statute nor laches commenced to run. And this rule is applicable whether or not the action itself be based on fraud. See p. 232, Subd. (4).

In this case the court quoted from

Waugh v. Guthrie, Etc. Co., 37 Okla. 239; 131 Pac. 174, at 178,

as follows:

"In *Waugh v. Guthrie, etc. Co.*, supra, it was held that the employment of artifice in concealing the cause of an explosion from which the plaintiff sustained injuries amounted to fraudulent concealment which tolled the statute, the plaintiff having been diligent in his efforts to ascertain the cause. The court said: 'It is no sufficient answer to say, as have counsel in their brief, that plaintiff must have known that he was blown up, and realized that he was injured. This he undoubtedly knew; but it was the

fact that defendant by its negligence was the cause of the injury that gave rise to the cause of action against it, not the mere fact of injury. Upon the trial the party relying on fraudulent concealment of the cause of action to avoid the statute would have the burden of proving such concealment. Following what we believe to be the great weight of authority, and keeping in mind that the very purpose of the statute of limitations was to prevent fraud and not to make it secure and successful, we conclude that the petition stated a good cause of action, and that the trial court erred in sustaining the demurrer.' "

Suspicion on the part of appellants that appellees were violating the anti-trust law and even their belief that such was the fact, does not start the running of the statute of limitations.

American Surety Co. v. Pauly, 170 U.S. 133.

On page 145, the court said:

"* * * It is not sufficient to defeat the plaintiff's right of action upon the policy that it be shown that the plaintiff may have had suspicions of dishonest conduct of the cashier; * * * He may have had suspicions of irregularities; he may have had suspicions of fraud, but he was not bound to act until he had acquired knowledge of some specific fraudulent or dishonest act which might involve the defendant in liability for the misconduct."

Therefore by reason of the foregoing facts and law the motions to dismiss should have been denied and the case sent back for trial on the merits. Not only by reason of the facts charged and admitted but also upon the ground that a question of fact as to the existence of such fraud and concealment and the time of the discovery thereof had been brought into existence by the filing of the motions and therefore the Court was obligated by the rules hereinabove set forth to deny the motions.

**The Tolling of the Statute by Reason of Fraud and Concealment
Is Applicable to Actions at Law as Well as Those in Equity**

This is a rule of long standing in the Federal courts—in the Supreme Court and in the Circuits.

American Tobacco Co. v. Peoples Tobacco Co., 204 Fed.
58 (C.C.A. 5th),

was a civil action at law for damages under the antitrust act and was a case similar in many respects to the one herein presented. On p. 61 the court said:

“The court then proceeds to state that the petition was filed in January, 1908, and that the plaintiff alleges he did not know of the combination and its operation against him until December, 1907, clearly indicating, and saying to the jury, and so they must have understood, that if the plaintiff knew, or could have known, more than a year before the filing of its petition, of this unlawful combination against it, the plea of prescription would be good. The view of the court, as indicated by the charge, was that prescription did not begin to run until the Peoples Tobacco Company knew, or ought to have known, of the agreement or arrangement called ‘a combination or conspiracy’ on the part of the other tobacco companies against it. *While it might have known that its profits were falling off, and that the competition of the Craft Tobacco Company was causing this, this could not give it a cause of action under the provisions of the Sherman Law, and until it discovered that it had a right of action prescription would not commence to run.* We think this states substantially the law of the case, and is the correct view of the question of prescription.”

The italicized portions of the above quotation show the striking similarity to the facts presented in the case at bar, for here, while appellants knew that they were being damaged, and may have at various times believed that the acts of appellees were the cause thereof, that alone did not give appellant a cause of action under the Sherman law until it discovered the conspiracy of 1929. Further, the Court stated (p. 63) as follows:

"Why should not the prescriptive period in this case commence at the time the combination against the plaintiff was discovered? The Sherman Act gives the right to an action for conspiracy to injure the business of the plaintiff, such as was alleged, and such as we consider to have been established in this case. No action could be brought by the plaintiff until he had knowledge of the facts which gave him a cause of action. We think the court below was right in holding as it did on this question."

The Court cited and relied upon the case of

Bailey v. Glover, 21 Wall. 342; 22 L.Ed. 637.

On p. 62 the Court in the Tobacco case quoted from *Bailey v. Glover* as follows:

"In *Bailey v. Glover*, 21 Wall. 342, 22 L.Ed. 636, in the opinion by Mr. Justice Miller, this is said:

'In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or effort on the part of the party committing the fraud to conceal it from the knowledge of the other party.'

"Afterward in the opinion the following is added:

'But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded on a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds—to prevent parties from asserting rights after the lapse of time had destroyed

or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side.'

"This case of *Bailey v. Glover* has since been frequently recognized in decisions by the Supreme Court and other United States courts. In *Traer v. Clews*, 115 U.S. 528, 6 Sup. Ct. 155, 29 L.Ed. 467, the court, in discussing the question involved here as to the suspension of the statute of limitations, where the facts on which the case was based had been concealed, said (115 U.S. 538, 6 Sup. Ct. 159, 29 L.Ed. 467):

'The case of *Bailey v. Glover* has never been overruled, doubted, or modified by this court.'

"Many other authorities to the same effect might be cited, but the foregoing are considered sufficient to establish the principle which must control here."

The rule established in *Bailey v. Glover* was adopted by the Supreme Court in *Holmberg v. Armbrrecht*, 327 U.S. 392, 66 Sup. Ct., 582. There the Supreme Court stated:

"Where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of statute of limitations does not begin to run until the fraud is discovered, though there may be no special circumstances or efforts on part of party committing fraud to conceal it from other party."

On page 395 the Court further stated:

"* * * Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to

actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitations (citing cases) * * *. The present case concerns not only a federally created right, but a federal right for which the sole remedy is in equity (citing cases). * * * When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.

After further discussion, the Court went on to say:

"Equity eschews mechanical rules: it depends on flexibility. Equity has acted on the principle that laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced * * * (citing cases). And so a suit in equity may lie though a comparable cause of action at law would be barred. If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.

"Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against another form of fraud" * * *.

"It would be too incongruous to confine a federal right within the bare terms of a state statute of limitation unrelieved by the settled federal doctrine as to fraud when even a federal statute in the same terms could be given the mitigating construction required by that doctrine."

Holmberg v. Armbrecht—is the leading case on the subject. It is a crystallization of a legal doctrine which for decades has been in the making. In it, for an all but unanimous court, Mr. Justice Frankfurter considers the problems presented in cases which seek to vindicate federal-established rights and the relevant Acts of Congress contain no statute of limitation. He points out that in the silence of Congress state law has been drawn upon to fill in the interstices; insists that "it would be incongru-

ous to confine a federal right within the bare terms of a state statute of limitations"; and insists that "federal courts, sitting as national courts throughout the country" should apply their own principles in enforcing a right created by Congress. The opinion, in specific terms, holds that when a plaintiff has not slept on his rights the statute of limitations should not begin to run until the fraud is discovered.

The instant case and the *Holmberg* case are much alike; and they present the same issue in respect to the use of the state statute of limitations in cases seeking to vindicate rights granted by Congress. The two cases are alike suits for money damages. In each there has been the successful concealment of fraud, delaying the framing and filing of the complaint. The difference is that whereas in the *Holmberg* case, the fraud and the concealment thereof is proved, in the instant case it is, through failure to deny the allegations, admitted. The *Holmberg* case is technically in equity because its concern is with bankruptcy; but, had a prayer for an injunction been added, the instant case could have been made to sound in equity. If in the *Holmberg* case, the plea of the statute of limitations is rejected, while in the instant case it is accepted, so substantial a difference in the administration of justice ought not to depend upon so irrelevant a standard as the historical name by which the cause of action is called. It is to the point that the rationale which supports the *Holmberg* decision applies without qualification to the instant case. If there is a difference, the rule ought to apply *a fortiori* in the instant case; for, whereas in a bankruptcy proceeding, it is only the group of creditors, large or small, which is injured, the very purpose of the suit for triple damage is to vindicate the right not only of the private suitor but of the general public as well.

To conclude this point: the distinction between law and equity is rapidly being done away with in order to reach the fundamental desire to do full justice between the parties involved and without the necessity of stepping from the "law" table

in the courtroom to the "Equity" table in the same room in order to satisfy the old common law distinctions between law and equity. The modern method of allowing one and the same judge to pass upon both legal and equitable questions is but one illustration of the modern trend to simplification of remedies and procedure. Equitable defenses, permitted in many purely legal actions, is another illustration. The three authorities cited in this subdivision, particularly *Bailey v. Glover*, supra, conclusively show the present intent of the courts to allow a wronged party, especially when such wrong is based in fraud and concealment as is here present, the benefit of what at one time were denominated strictly equitable pleadings or steps. While we contend that the present proceeding, due to the fraud here present as alleged and admitted, could for the purposes required permit its designation as equitable, we equally contend that it is immaterial how it is designated and that, pursuant to the authorities here cited, all manner of pleas or defenses whether called legal or equitable are available to appellants.

VIII.

The Statute of Limitations Cannot Be Raised on a Motion to Dismiss

R. C. P., Rule 8(c):

"Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, *release*, *res judicata*, statute of frauds, *statute of limitations*, waiver, and any other matter constituting an avoidance or affirmative defense.
* * *

Also see—Rule 12(b).

In *Dirk Ter Haar v. Seaboard, Etc.*, 1 F.R.D., p. 598 (S.D. Cal.), it is held:

"The defenses of laches, stale demands and the statute of limitations may not be asserted by motion to dismiss, but should be set forth affirmatively in defendant's answer (Federal Rules of Civil Procedure 8(c), 12(b), 28 U.S.C.A. following section 723c. *Patsavouras v. Garfield*, D.C., 34 F. Supp. 406; *Munzer v. Swedish American Line*, D.C., 30 F. Supp. 789; *Holmberg v. Hannaford*, D.C., 28 F. Supp. 216; *Raker v. United States*, D.C., 1 F.R.D. 432; *Baker v. Sisk*, D.C., 1 F.R.D. 232; *Nordman v. Johnson City*, D.C., 1 F.R.D. 51), and that same rule prevails as to the defense of pendency of another action. F.F.C.P. 12(b); *Sproul v. Gambone*, D.C., 34 F. Supp. 441."

To the same effect is *Carlisle v. Kelly Etc.*, 72 Fed. Supp. 326 (D.C. E.D. Penn.), where the court stated (Subd. (1)):

"The first reason advanced by the defendant is that the plaintiff's claim is barred by the applicable statute of limitations, which it contends is the statute of limitations of the State of Delaware, where the accident occurred. Under Rule 12(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, *the defense of statute limitations may not be raised by motion, but must be affirmatively pleaded*. *Kraushaar v. Leschin*, D.C.E.D. Pa., 4 F.R.D. 143; *Massachusetts Bonding & Ins. Co. v. Darby*, D.C.W.D. Mo., 59 F. Supp. 175. Therefore, I cannot consider the validity of this defense on the present motion."

Such is the ruling of this Court. See *Bowles v. Glick Bros., Etc.*, 146 F.(2) 566 (9th Cir.), where it is stated:

"The defenses which may be interposed by motion are confined to those enumerated in Rule 12(b).

Rule 12(b) is as follows:

"(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the *responsive* pleading thereto if one is required except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person,

(3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an *indispensable party*. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. *If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."*

This rule must be read in the light of Rule 8(c) set forth, *supra*.

The most that could be claimed for Rule 12(b) in the present case is that the motion to dismiss will be considered as a motion for summary judgment in accordance with Rule 56. Such an interpretation would call for the adoption of the rule of law (*supra*) that the court cannot pass upon a direct question of fact presented by the complaint and responsive affidavits for as soon as such pleadings disclose that a question of fact exists the motion must be denied and the parties sent to trial upon the merits.

Therefore, by reason of the foregoing, the lower court erred in considering the various pleas of the statute of limitations and the judgment should be reversed.

The Question of the Two Releases of 1934 and 1942 Urged by Appellees Cannot Be Considered on the Motions to Dismiss and for Summary Judgment and Must Be Raised in an Affirmative Defense. Also, the Lower Court Erred in Considering and Passing Upon the Facts Presented by and Surrounding the Claimed Releases in Question.

The complaint describes the 1934 release in Paragraph 84 (R. 65); the 1942 release and sale are fully described in Paragraph 88(E) (R. 73).

In the affidavit of Mr. Lasky he refers to these two releases (R. 127), and the same are attached to such affidavit as Exhibit 11 (R. 273) and Exhibit 12 (R. 413).

Rule 8(c) covering affirmative defenses states directly that a party shall set forth *affirmatively*, a claim of Release; accordingly, the lower court was without jurisdiction to entertain any consideration of such question.

In *Jack, Etc. v. Associates, Etc.*, 125 F.(2) 778 (3 Cir.), it was held (Subd. (14)): that in an action on contract, release is new matter constituting a defense and, if relied upon, must be specially pleaded. Citing Rule 8(c).

In addition to the foregoing and supplementing the discussion on the questions of fact surrounding the execution and effect of the releases, permit us to advance the following contentions, namely:

In spite of the fact that the presentation of these releases raises distinct and separate questions of fact, the lower court instead of denying the motions upon such ground proceeded in its opinion to refer to such releases (R. pp. 614 and 615), and then presumed to rule on the same in two places, namely (R. 619), where it states:

"Too, the record seems to firmly establish the fact that the plaintiffs knew, or had reason to believe, that the acts of the defendants which caused the claimed damages were a violation of the Anti-Trust Laws. Such fact precludes plaintiffs from availing themselves of this exception which

would toll the statute of limitations until the alleged date of discovery in 1944." (Note: The Court fails to fix the date when "the plaintiffs knew or had reason to believe" it might have been within the statutory period.)

And further states (R. 620):

"In every transaction with the defendants the plaintiffs have received consideration or an adjudication of their rights by a court having jurisdiction."

Here the Court has made two findings of fact as fully and to all intent and purposes as though the case had been tried upon the merits and it had found from the evidence presented by both sides as set forth in such quotations. This was pure error and alone calls for the reversal of this case.

The facts of *Frederick Hart & Co. v. Recordgraph Corp.*, 169 F.(2) 580 (3 Cir.) and cited, *supra*, are remarkably similar to those presented herein and we respectfully request a close examination of such citation.

On page 583 the court said:

"The foregoing clearly establishes the *existence of a fact issue* with respect to what was actually said by Murry to Weber. It was at that point that the District Court's consideration should have terminated and Recordgraph's motion denied. Instead, the District Court proceeded to *decide* the fact issue and thereby committed error under the applicable principles of law stated earlier in this opinion. It is immaterial that it *decided* the fact issue in Recordgraph's favor—the point is that it went beyond its province to resolve any fact issue on a motion to dismiss or for summary judgment. Cf. *Sarnoff v. Ciaglia*, 3 Cir., 1947, 165 F.2d 167." (Court's italics.)

On the consideration of the claim of Release many questions of fact would arise, among them as to whether such releases covered unknown claims and as to appellants' statements in the complaint that they would not have given such releases had they known of the 1929 conspiracy.

Section 1542 of the *Civil Code of California* provides

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor

at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

The case of *Jordan v. Guerra*, 23 Cal.(2d) 469, illustrates the many questions of fact which might be raised concerning these claimed releases.

Also see

Raynale v. Yellow Cab Co., 115 Cal. App. 90; 300 Pac. 991.

Also,

Radio Corporation v. Raytheon Mfg. Co., 296 U.S. 459; 56 S.Ct. 297, which is illustrative of the "fact" questions here presented.

By reason of the foregoing, it is respectfully submitted that the lower court erred in passing upon the questions of fact presented by the defense of Release as urged and that by reason thereof the judgment should be reversed.

X.

The Lower Court Erred in Denying Appellants' Motion for Permission to Amend Their Complaint

After the rendition of the decision of the lower Court on November 22, 1948 (R. 610) and which decision was entered in the Civil Docket on November 24, 1948, appellants served notice of motion to alter or amend the judgment of dismissal (R. 621) in the following respect: By striking from such decision the last two paragraphs and inserting in lieu thereof, the following:

"It is hereby ordered that plaintiffs, above named, may, if they so elect, move this Court for an order permitting them to amend their complaint on file herein, said motion, if any, to be made on or before ten (10) days from the date of this order permitting the filing of such motion to amend."

Under date of December 17, 1948, the Court made its order (R. 623) as follows:

"It is Ordered that the plaintiffs' motion to amend or alter the judgment entered herein on November 24, 1948, be and the same hereby is Denied.

"Dated December 17, 1949

/s/ MICHAEL J. ROCHE,

United States District Judge.

"[Endorsed]: Filed Dec. 17, 1948."

Rule 59(e) provides for a motion to alter or amend as made herein.

Refusal of the lower Court to permit the filing of an amendment was error.

Louisiana Farmers, Etc. v. Great Atlantic, Etc., 131 F.(2) 419.

There it was held:

"In action by Louisiana strawberry growers' association for treble damages for violation of anti-trust laws, complaint charging an agreement or combination among retail chain grocers to control prices in interstate commerce in Louisiana strawberries, and thus eliminate competition in interstate commerce, was not so deficient in allegations of 'ultimate facts' as to justify dismissal without leave to amend on ground that 'conclusions of law' only were pleaded. Sherman Anti-Trust Act Secs. 1, 2, 7 as amended, and Clayton Act Sec. 2, 15 U.S.C.A. Secs. 12, 2, 15 and Sec. 13; Robinson-Patman Price Discrimination Act, Sec. 3, 15 U.S.C.A. Sec. 3, 15 U.S.C.A. Sec. 13a; Federal Rules of Civil Procedure, rule 8(a), 28 U.S.C.A. following section 723c."

Also (p. 420):

"A plaintiff is entitled to opportunity to attempt to establish allegations of its complaint, regardless of how improbable it may be that plaintiff can do so."

Also see Subdivisions 5 and 10.

Also see

Rogers v. Girard Trust Co., 159 F.(2) 239 (6th Cir.).

It was stated as follows (p. 241):

"As the appellee had filed no responsive pleading to the complaint, appellant was entitled to amend as a matter of course. Rule 15(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c. Leave of the District Court was not necessary, *but it was error to deny the leave when asked.*" (Italics ours.)

The opinion of the lower Court criticizes the complaint in various respects, partially on questions of fact and partially on the failure to set forth facts sufficient to constitute a cause of action. As to any one of these the plaintiffs would be entitled in an ordinary action to amend their complaint so as, if possible, to overcome the criticisms made by the court; however, for some reason or another, the lower Court herein refused to give to appellants such a right although the authorities cited substantiated in all respect not only the propriety but the duty to permit such amendment. Among such criticisms in the opinion, and referred to above, is the following (R. 619, bottom of page), where the Court states: "Apart from such bar however, no cause of action is stated by any of the claims made by the plaintiffs, including any claim with respect to the transaction of 1942." A reference to the allegations of the complaint as to the transaction of 1942 completely refutes such statement and we respectfully ask this Court to make an examination of such part of the Record. At p. 620 of the Record in the first paragraph, the Court states:

"The instant complaint fails to affirmatively allege any injuries suffered by reason of the defendants' alleged violations of the Anti-trust Laws."

Such statement certainly warranted the opportunity to appellants to amend. Further on in such opinion (R., p. 620) the court also states:

"In a like manner, the complaint fails to affirmatively show injuries to plaintiffs' business or property for any of the transactions or event delineated."

Such statements of the Court bring appellants clearly within the rules laid down by the foregoing authorities, especially in a treble damage anti-trust case where the courts have all held that the rules of construction as to the complaint must be liberal and with the thought in mind that it is permissible to draw a complaint in such form of action in a general and non-technical manner. For some reason not disclosed the lower Court elected to apply the most drastic rules of construction to the complaint herein without benefit of the right to amend and correct, in all of which we respectfully submit that it erred grievously and without right and that therefore the judgment herein should be reversed.

CONCLUSION

We believe that we have demonstrated that the lower Court erred in its rulings in the manner set forth hereinabove and that by reason thereof and of the authorities cited in support of our grounds for a reversal this Court should reverse the judgment and send the case back for a trial on the merits and also direct the lower Court to permit appellants to amend their complaint should they so elect.

Respectfully submitted,

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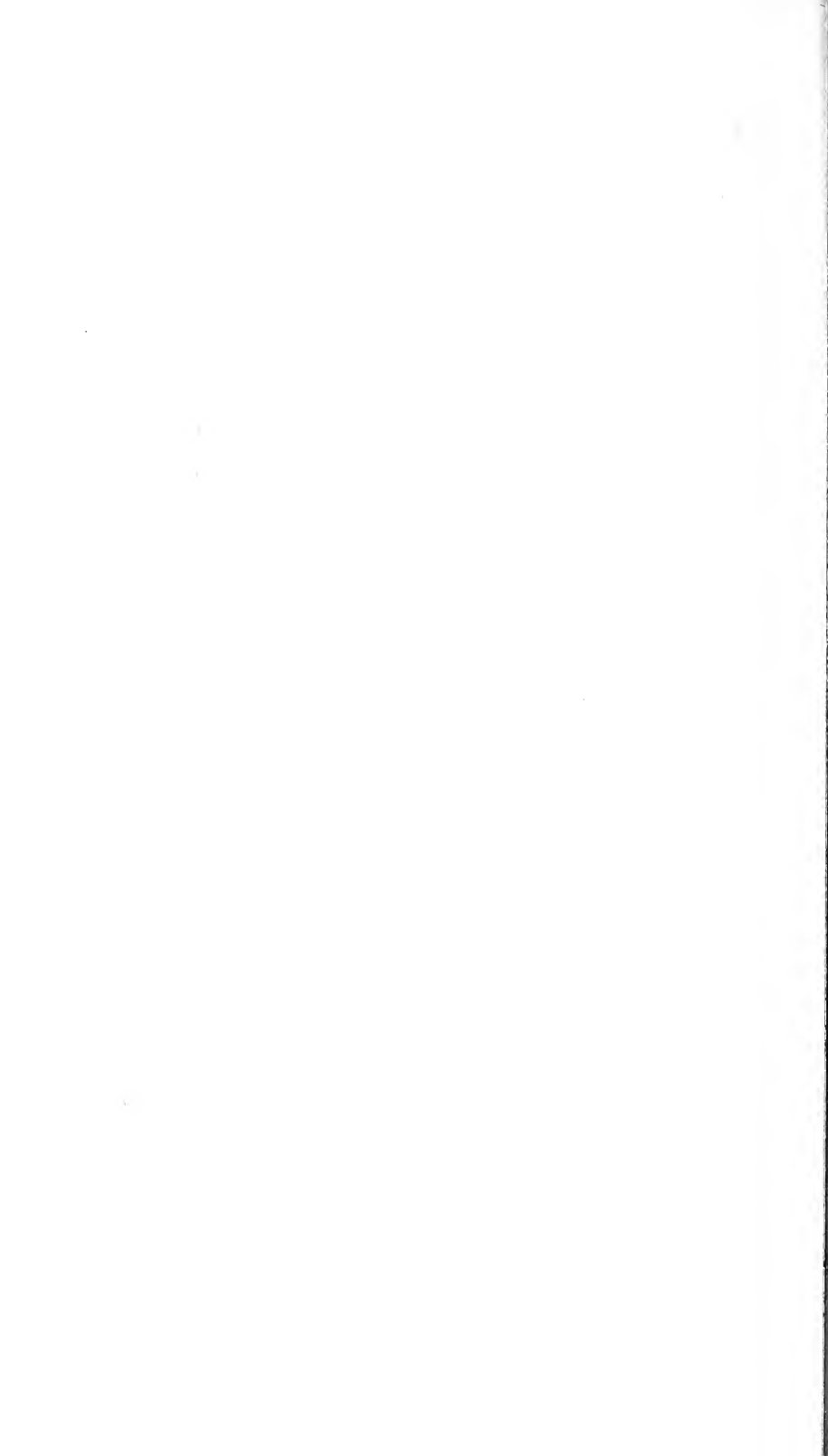
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IN THE

United States Court of Appeals

For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation;
 MOJAVE BORAX COMPANY, LTD., a corporation;
 PAUL O. TOBELER, Executor of the Last Will and Testament
 of John K. Suckow, Deceased, and RUTH E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX
 COMPANY, UNITED STATES BORAX COMPANY, AMER-
 ICAN POTASH & CHEMICAL CORPORATION, STAUF-
 FER CHEMICAL COMPANY, WEST END CHEMICAL
 COMPANY, et al.,

Appellees.

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 Bank of America National Trust & Savings
 Association as Executor of the Last Will
 and Testament of Clarence M. Rasor, Stauffer
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FILED

JUL 11 1949

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CLERK

SUBJECT INDEX

| | Page |
|--|------|
| Statement of the Case..... | 2 |
| A. Nature of the case..... | 2 |
| B. The case is controlled by the decision of this Court in Burnham Chemical Co. v. Borax Consolidated, Ltd., 170 F.2d 569 | 2 |
| C. The proceedings below..... | 4 |
| D. Comparison of the issues here with those in Burnham case.... | 5 |
| E. The allegations of the complaint..... | 5 |
| 1. Up to the fall of 1934..... | 6 |
| 2. 1934 to 1942..... | 9 |
| F. The facts as shown by the uncontradicted documents. In numerous lawsuits pending years ago appellants accused appellees of the alleged violations of the antitrust laws constituting the basis of the present suit..... | 10 |
| 1. January 13, 1930. Relative to the case of Borax Consolidated, Ltd. v. John K. Suckow, No. 20694, Superior Court, Kern County..... | 11 |
| 2. July 14, 1930: In Borax Consolidated, Ltd. v. Suckow Borax Mines Consolidated, Inc., John K. Suckow, et al., No. C-107-M, U. S. District Court, Southern District of California | 14 |
| 3. December 8, 1932: Same suit, C-107-M..... | 15 |
| 4. December 26, 1932: Same suit, C-107-M..... | 19 |
| 5. July 13, 1933: Same suit, C-107-M..... | 20 |
| 6. November 15, 1933 to November 22, 1933: In hearings in Los Angeles before U. S. Senate Committee Investigating bankruptcy proceedings in U. S. courts..... | 21 |
| 7. December 28, 1933, in above-mentioned suit No. C-107-M, Borax Consolidated, Ltd. v. Suckow..... | 24 |
| 8. January 12, 1934: Same suit, C-107-M..... | 25 |

| | Page |
|--|------|
| 9. January 25, 1934: Same suit, C-107-M..... | 25 |
| 10. January 30, 1934: Same case, No. C-107-H..... | 27 |
| 11. January 27, 1934: In the Matter of Suckow Borax Mines Consolidated, Inc., a corporation, bankrupt, No. 16938-H, United States District Court, Southern District of California | 27 |
| 12. February 13, 1934: Same case, No. 16938-H..... | 29 |
| 13. February, March and April, 1934: Same case, No. 16938-H | 29 |
| 14. July 18, 1934: Borax Consolidated, Ltd., plaintiff v. Ruth E. Suckow, John K. Suckow, et al., defendants, No. 310-J, United States District Court, Southern District of California | 30 |
| G. The facts concerning the releases..... | 31 |
| 1. The 1934 releases..... | 31 |
| 2. The 1942 release..... | 32 |
| H. There is no pretense of a claim stated on behalf of appellants Mojave Borax Company, Tobeler as Executor of Suckow's will or Ruth E. Suckow..... | 32 |
| Discussion | 33 |
| I. Discussion Relative to All Events Alleged to Have Occurred Through the General Settlement of 1934..... | 33 |
| A. On the face of the complaint these claims are barred by the statute of limitations..... | 33 |
| 1. The controlling principles as laid down by this Court in the Burnham case. The statutory period is three years and the statute runs against each overt act..... | 33 |
| 2. The claims are barred on the face of the complaint.... | 35 |
| 3. The statute of limitations can be raised on the face of a complaint by a motion to dismiss..... | 35 |
| 4. Appellants' argument of "continuing conspiracy" was rejected as unsound in the Burnham case..... | 37 |
| 5. The argument about "nondiscovery", fraud and concealment was likewise rejected as unsound in the Burnham case | 37 |

| | |
|---|----|
| B. Dismissal because of the statute of limitations was proper on the motion for summary judgment: Appellants' excuses for delay are pure sham..... | 40 |
| 1. Courts have clear power to grant a motion for summary judgment when the bar of the statute of limitations is shown by undisputed facts outside the complaint | 40 |
| 2. The facts are uncontradicted and indisputable. There is no conceivable issue of fact..... | 42 |
| Appellants' counteraffidavits | 45 |
| 3. The argument that, while appellants believed that there was a conspiracy formed in 1927, they did not have in mind one formed in 1929, is false in fact and irrelevant in law | 46 |
| False in fact | 46 |
| Irrelevant in law..... | 48 |
| C. The claims were released, a fact not only shown on the face of the complaint but indisputably established by the documents filed in support of the motion for summary judgment | 51 |
| 1. All appellees were released..... | 51 |
| 2. The releases were all-comprehensive..... | 52 |
| 3. The defense of release may properly be raised on motion to dismiss and for summary judgment..... | 52 |
| 4. Appellants' allegation to escape the releases is irrelevant. A release specifying unknown claims is effective to release claims though unknown..... | 53 |
| 5. Appellants' allegation to escape the releases is false and sham. Appellants were aware of their claims..... | 55 |
| 6. There is no issue of fact concerning the releases. The suit was not one to set them aside..... | 58 |
| D. In fact no claim for relief is stated because what appellants seek to do is to go behind final judicial decrees and judgments | 59 |

| | Page |
|---|--------|
| II. Discussion Relative to Events Alleged to Have Occurred After 1934 and Ending December 1942..... | 64 |
| A. Recapitulation of the allegations concerning the period after 1934 | 64 |
| B. If any claims for relief ever accrued, they too have been barred by the statute of limitations..... | 66 |
| C. Any claims that may have existed were released..... | 66 |
| 1. Cave-ins | 67 |
| 2. Use of shafts and tunnels..... | 68 |
| 3. Sale | 68 |
| D. No claim for relief is stated..... | 70 |
| 1. The governing legal principles..... | 71 |
| 2. Application of these rules to the particular case..... | 73 |
| III. The Court Below Did Not Err in Refusing to Set Aside the Judgment in Order to Permit Appellants to Amend the Complaint a Third Time..... | 76 |
| IV. Special Considerations Pertaining to Appellee Bank of America as Executor of Rasor's Estate..... | 78 |
| Conclusion | 80 |
| Appendix 1: Digest of the Agreement of August 18, 1934..... | App. 1 |
| Appendix 2: Appellants' Counteraffidavits raised no issue of fact.... | App. 3 |

TABLE OF AUTHORITIES CITED

| | Pages |
|---|--|
| CASES | |
| Abram v. San Joaquin Cotton Oil Co., 46 F. Supp. 969..... | 36 |
| Aetna Casualty & Surety Co. v. Abbott, 130 F.2d 40..... | 77 |
| A. G. Reeves Steel Const. Co. v. Weiss, 119 F.2d 472..... | 36 |
| Albert Pick-Barth Co. v. Mitchell, etc. Co., 57 F.2d 96..... | 37n |
| Alden-Rochelle Inc. v. American Society of Composers, etc., 80 F. Supp. 888 | 72 |
| American Banana Company v. United Fruit Co., 166 Fed. 261.... | 63 |
| American Banana Company v. United Fruit Company, 213 U.S. 347 | 63 |
| American Tobacco Company v. Peoples Tobacco Company, 204 Fed. 58 | 38n |
| Ansehl v. Puritan etc. Co., 61 F.2d 131..... | 41n |
| Associates Discount Corporation v. Crow, 110 F.2d 126..... | 41n |
| Bailey v. Glover, 21 Wall. 342..... | 38n |
| Bank of America etc. Assn. v. Ames, 18 C.A.2d 311..... | 36 |
| Bee v. Cooper, 217 Cal. 96..... | 51 |
| Beegle v. Thomson, 138 F.2d 875..... | 71 |
| Berry v. Chrysler Corporation, 150 F.2d 1002..... | 36 |
| Berry v. Struble, 20 C.A.2d 299..... | 54 |
| Bonvillain v. American Sugar Refining Co., 250 Fed. 641..... | 79 |
| Bowles v. Glick Bros. etc., 146 F.2d 566..... | 36n |
| Burchmore v. H. M. Byllesby & Co., 1 N.W.2d 327 (Neb. 1941) | 45n |
| Burnham Chemical Company v. Borax Consolidated, Ltd., et al., 170 F.2d 569..... | 2, 5, 33, 34, 37, 38, 38n, 39, 40, 41, 43, 44, 45, 48, App.4 |
| Caillouet v. American Sugar Refining Co., 250 Fed. 639..... | 79 |
| Chetwood v. California National Bank, 113 Cal. 414..... | 57 |
| Chicago Pneumatic Tool Co. v. Hughes Tool Co., 61 F. Supp. 767 | 61, 62 |
| City of Atlanta v. Chattanooga Foundry & Pipe Co., 101 Fed. 900 at 901; affd. 203 U.S. 390..... | 72 |
| Clark Oil Company v. Phillips Petroleum Company, 148 F.2d 580 | 51, 72 |
| Dabney-Johnston Oil Corp. v. Walden, 4 Cal. 2d 637..... | 65n, 70 |
| Domestic and Foreign Commerce Corporation v. Littlejohn, 165 F.2d 235 | 41n |

| | Pages |
|--|----------------------------|
| Evans v. Duke, 140 Cal. 22..... | 50 |
| Farrall v. District of Columbia Amateur Athletic Union, 153 F. 2d 647 | 42 |
| Feak v. Marion Steam Shovel Co., 84 F.2d 670..... | 45n |
| Fidelity, etc. Co. v. Jasper Furniture Co., 117 N.E. 258 (Ind.).... | App. 4 |
| Fidelity Storage Co. v. Urice, 12 F.2d 143..... | 62 |
| F. L. Mendez & Co. v. General Motors Corp., 161 F.2d 695..... | 48, 49, 50, 56, 57, 62, 63 |
| Foster & Kleiser v. Special Site Sign Co., 85 F.2d 742.. | 38n, 39n, 43, 48 |
| Gale v. Witt, 31 Cal. 2d 362..... | 62 |
| Gerini v. Pacific Employers Insurance Co., 27 C.A.2d 52..... | 62 |
| Gifford v. Travelers Protective Association of America, 153 F.2d 209 | 40, 52 |
| Glenn Coal Company v. Dickinson Fuel Co., 72 F.2d 885..... | 71 |
| Gossard v. Gossard, 149 F.2d 111..... | 36 |
| Hicks v. Bekins Moving & Storage Co., 87 F.2d 583..... | 79 |
| Holmberg v. Armbrecht, 327 U.S. 392..... | 38n |
| Hook v. Wren, 44 C.A.2d 441..... | 78 |
| Jack Mann Chevrolet Co. v. Associates Inv. Co., 125 F.2d 778.... | 52 |
| Jackson v. Buchanan, 59 Ind. 390..... | 45n |
| Jordan v. Guerra, 23 Cal. 2d 469..... | 58 |
| Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156.. | 63, 71, 72 |
| Kithcart v. Metropolitan Life Insurance Company, 150 F.2d 997.... | 36 |
| Land v. Dollar, 330 U.S. 731..... | 41n |
| Lattin v. Gillette, 95 Cal. 317..... | App. 4 |
| Laughlin v. Garnett, 138 F.2d 931..... | 76 |
| Ledbetter v. Farmers, etc. Co., 142 F.2d 147..... | 41n, 77 |
| Leonard v. Socony Vacuum Oil Co., 42 F. Supp. 369..... | 72 |
| Lilly v. United States Lines Co., 42 F. Supp. 214..... | 77 |
| Lindsey v. Leavy, 149 F.2d 899..... | 41, 53 |
| Louisiana Farmers Protective Union v. Great A. & P. Co., 131 F.2d 419 | 77 |

TABLE OF AUTHORITIES CITED

vii

| | Pages |
|---|------------|
| Maltz v. Sax, et al., 134 F.2d 2..... | 64 |
| Momand v. Universal Film Exchange, 43 F. Supp. 996..... | 34 |
| Momand v. Universal Film Exchanges, 172 F.2d 37..... | |
|34, 34n, 37, 57, 63, 71, 75, 76 | |
| Moore v. Backus, 78 F.2d 571..... | 79 |
| Neff v. New York Life Ins. Company, 30 Cal. 2d 165..... | 45n |
| Neher v. Kauffman, 197 Cal. 674..... | 78 |
| Nicolaisen v. Toffelmier, 97 Cal. App. 342..... | 50 |
| Northwestern Oil Co. v. Socony Vacuum Oil Co., 138 F.2d 967.... | 51, 72 |
| Pacific Greyhound Lines v. Zane, 160 F.2d 731..... | 54, 55 |
| Phillips v. Baker, 114 S.W.2d 421 (Tex. 1938)..... | 45n |
| Piantadosi v. Loew's Inc., 137 F.2d 534..... | 42, App. 3 |
| Radio Corporation v. Raytheon Mfg. Co., 296 U.S. 459..... | 58n |
| Raynale v. Yellow Cab Company, 115 Cal. App. 90..... | 58 |
| Rogers v. Girard Trust Company, 159 F.2d 239..... | 77 |
| Scafidi v. Western Loan & Building Co., 72 C.A.2d 550..... | App. 4 |
| Schwab v. Nathan, 8 F.R.D. 227..... | 77 |
| Silica Brick Co. v. Winsor, 171 Cal. 18, 22..... | 47 |
| State of Oklahoma v. American Book Company, 144 F.2d 585..... | 38n |
| Stephens v. Reed, 121 F.2d 696..... | 78 |
| Strout v. United Shoe Machinery Co., 208 Fed. 646..... | 48 |
| Taylor v. Bidwell, 65 Cal. 489..... | 62 |
| Texas Rice Land Co. v. McFaddin etc. Co., 265 S.W. 888..... | App. 4 |
| Thomsen v. Cayser, 243 U.S. 66..... | 72 |
| Treager v. Friedman, 79 C.A.2d 151, 172..... | 47 |
| Turman v. Holmes, 29 C.A.2d 198..... | 50 |
| Turner Glass Corporation v. Hartford-Empire Co., 173 F.2d 49.... | 71 |
| Twin Ports Oil Co. v. Pure Oil Co., 46 F. Supp. 149..... | 72 |
| Twin Ports Oil Co. v. Pure Oil Co., 119 F.2d 747..... | 72 |
| United Copper Securities Company v. Amalgamated Copper Co., 232 Fed. 574 | 79 |
| United States v. Frankfort, etc., 324 U.S. 293..... | 41n |
| United States v. Socony Vacuum Oil Co., 310 U.S. 150..... | 72 |

| | Pages |
|---|---------|
| Williamson v. Columbia Gas & Electric Corp., 110 F.2d 15..... | 51 |
| Willson v. Graphol Products Co., 165 F.2d 446..... | 41n |
| Wilson v. Aderhold, 89 F.2d 903..... | 60 |
| Wright v. Bankers Service Corporation, 39 F. Supp. 980..... | 36 |
| Young v. Garrett, 159 F.2d 634..... | 77 |
| Zaslow v. Kroenert, 29 Cal. 2d 541..... | 65n, 70 |
| Zeligson v. Hartman-Blair, Inc., 126 F.2d 595..... | 55 |

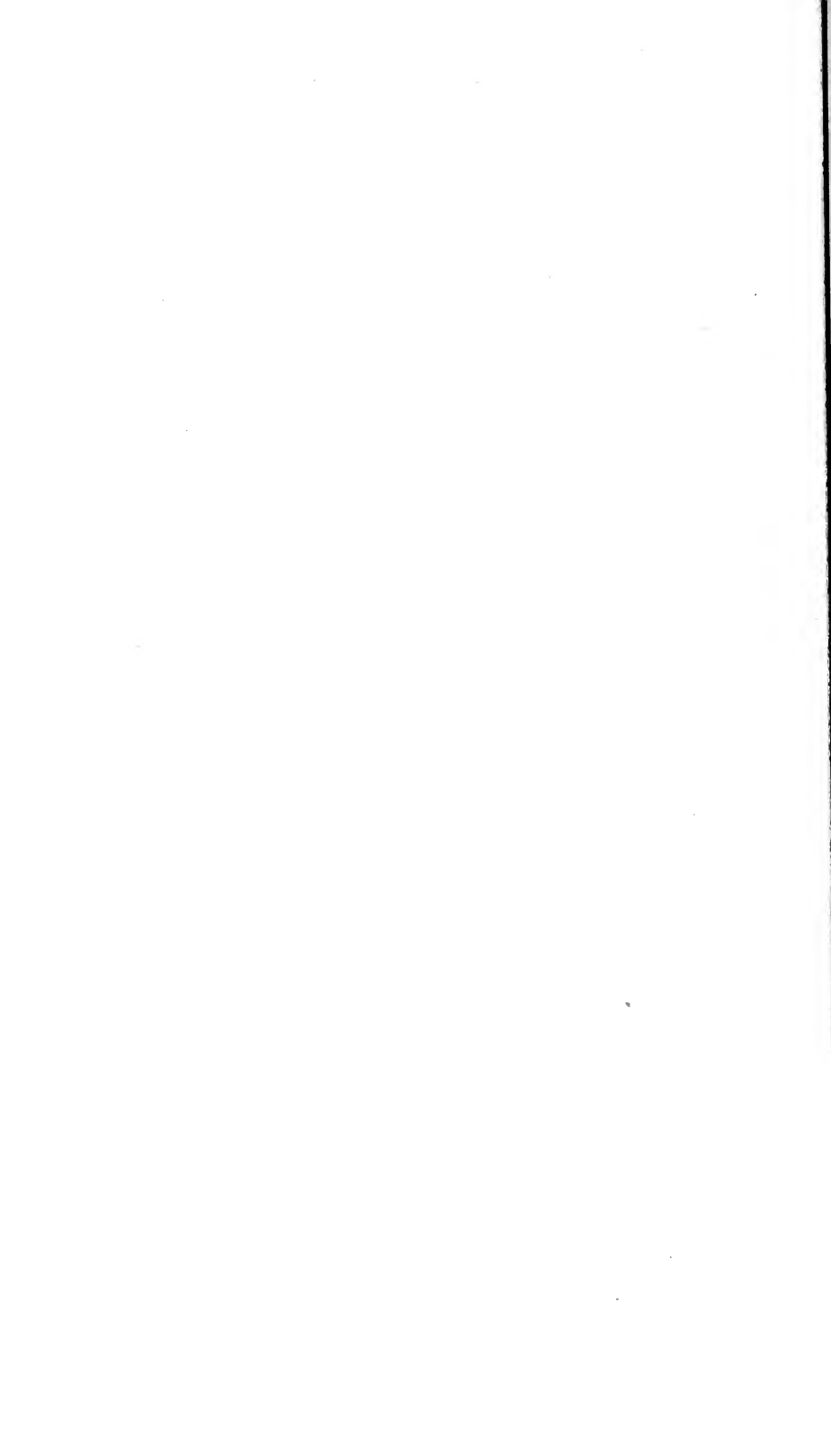
STATUTES AND RULES

| | |
|---|------------|
| California Civil Code | |
| Section 1542 | 54, 55, 56 |
| California Code of Civil Procedure | |
| Section 338(1) | 34, 39n |
| Section 338(4) | 38 |
| Moratorium Act of October 10, 1942..... | 66 |
| Rules of Civil Procedure | |
| Rule 9(f) | 35, 36 |
| Rule 56 | 4, 42 |
| Rule 56(e) | App. 3 |
| United States Code | |
| Title 15, Sec. 1..... | 49 |
| Title 15, Sec. 14..... | 49 |
| Title 15, Sec. 15..... | 70 |

TEXTS

| | |
|---|----|
| California Jurisprudence | |
| Vol. 21, pp. 178, 179..... | 78 |
| Corpus Juris Secundum | |
| Vol. 4, p. 2007, para. 1386..... | 60 |
| 1 Moore's Federal Practice (1st ed.), p. 597..... | 35 |

| | Pages |
|--|--------|
| 2 Moore's Federal Practice (2d ed.): | |
| Sec. 8.28, p. 1698..... | 52, 53 |
| page 1920 | 35 |
| page 2244 | 39 |
| page 2257 | 35, 40 |
| 3 Moore's Federal Practice (1st ed.), p. 3185..... | 42 |
| 3 Pomeroy's Equity Jurisprudence (5th ed.): | |
| Sec. 812, p. 230..... | 45n |
| Sec. 890, p. 502..... | 45n |
| Restatement of Torts, Sec. 885..... | 51 |



No. 12,158

IN THE

United States Court of Appeals

For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED,
INC., a corporation; MOJAVE BORAX COM-
PANY, LTD., a corporation; PAUL O. TOBE-
LER, Executor of the Last Will and Testament
of John K. Suckow, Deceased, and RUTH E.
SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC
COAST BORAX COMPANY, UNITED
STATES BORAX COMPANY, AMERICAN
POTASH & CHEMICAL CORPORATION,
STAUFFER CHEMICAL COMPANY, WEST
END CHEMICAL COMPANY, et al.,

Appellees.

Brief for Appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, James M. Gerstley, Frank M. Jenifer, Bank of America National Trust & Savings Association as Executor of the Last Will and Testament of Clarence M. Rasor, Stauffer Chemical Company, and West End Chemical Company.

This brief is filed on behalf of all but one of the appellees.¹

¹The caption on the transcript and appellants' brief lists 17 appellees. This is erroneous. Seventeen parties were named as defendants, but 6 were never served, and 2 were dismissed for lack of venue, no appeal being taken from the dismissal. There are only 9 appellees.

The plaintiffs will hereafter be referred to as appellants and the defendants as appellees. Appellant Suckow Borax Mines Consolidated, Inc. will be referred to as the Suckow company, and John K. Suckow, the testator of appellant Tobeler, will be referred to as Suckow.² Appellees Pacific Coast Borax Company and United States Borax Company are subsidiaries of Borax Consolidated, Ltd., and the group or its members will be referred to by any of these names, as is done in the complaint.

STATEMENT OF THE CASE

A. Nature of the Case.

This action was commenced on September 11, 1947. It is a treble damage suit brought under the antitrust laws (Clayton Act) by private parties, involving the borax industry and based on the claim that appellants were driven out of business many years ago. Upon motion to dismiss and motion for summary judgment, the action was dismissed, with an opinion now reported in 81 F. Supp. 301.

B. The Case Is Controlled by the Decision of This Court in *Burnham Chemical Co. v. Borax Consolidated, Ltd.*, 170 F.2d 569.

The action is controlled by the recent decision of this Court in *Burnham Chemical Company v. Borax Consolidated, Ltd.*, et al., 170 F.2d 569, certiorari denied by the United States Supreme Court on March 7, 1949 (336 U.S. 924).³

Both actions were instituted by the same attorney. Counsel who appeared before this Court on behalf of the Burnham company are counsel for appellants here. Most of the defendants

²In some of the quoted material the Suckow company is referred to as SBM, and appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, and United States Borax Company as BCL, PCB and USB.

³This Court denied rehearing on December 6, 1948. The Supreme Court denied a rehearing on April 18, 1949 (336 U.S. 955).

here were defendants there.⁴ Plaintiff claimed there, as appellants did here, that it was driven out of business by appellees. The identical conspiracy is alleged. The complaints in the two cases are almost identical.⁵

Upon motion to dismiss and a motion for summary judgment, the District Court dismissed the *Burnham* action as barred by the statute of limitations. This Court affirmed.

Similar motions were filed here⁶ and were extensively argued below, orally and in writing, while the *Burnham* case was pending in this Court. Appellants' arguments below were identical with those then being presented to this Court by the same counsel on behalf of the Burnham company. The District Court therefore held the case under submission until this Court should decide the *Burnham* case.⁷

The decision of this Court in the *Burnham* case having been rendered on October 27, 1948, the decision below followed on November 22, 1948.

In view of these facts, it is remarkable that appellants nowhere even mention this Court's decision in the *Burnham* case.

⁴The only additional defendants here are Stauffer Chemical Company, West End Chemical Company and two officers and the estate of one employee of the defendant Pacific Coast Borax Company.

⁵The first two paragraphs are the same, the next several describe the plaintiffs, and paragraphs 7-78, inclusive, of the complaint in the present action (R. 6-40) are identical with paragraphs 4-71, inclusive, of the Burnham complaint except for the addition of paragraphs describing additional defendants here. Both complaints then follow with a section entitled "As to the Plaintiff[s]."

⁶The motions of the Borax Consolidated group of defendants appear at R. 452, et seq. The other defendants filed similar motions. After the complaint was amended, it was stipulated on April 7, 1948, that the motions should be deemed addressed to the complaint as amended (R. 645).

⁷Thus, at the conclusion of the oral argument the court said (R. 667): "I think with the consent of everybody with relation to this litigation it would be well to wait until we have the final determination of the Circuit Court in the Burnham case. Wouldn't that be helpful?"

For aught their brief discloses, there never was any such decision. Yet the arguments made in that brief are identical with those presented to this Court and the Supreme Court in the *Burnham* case and there rejected as unsound.

C. The Proceedings Below.

Appellees' motions (R. 452, 446, 461) were of two types. First, they asked dismissal for reasons appearing *on the face of the complaint itself*, these reasons being as follows:

1. The action is barred on its face by the statute of limitations; and
2. No claim on which relief may be granted is stated. Here appellees made three independent points, viz.:
 - (a) release, shown by the complaint;
 - (b) conclusiveness of judgments, shown by the complaint;
 - (c) failure of allegations relative to damages.⁸

Second, appellees' motions, with the support of certain affidavits, asked for summary judgment (R. 455) under Rule 56, R.C.P.

In view of appellants' criticism of judgments based on affidavits, it will be noted that *the sole purpose of the affidavits was to bring before the court undisputed documentary material*.⁹ The procedure followed was the same as that in the *Burnham* case, where similar documents, establishing similar facts, were the foundation of the judgment of dismissal.

⁸We also made the point, noted briefly at p. 32, *infra*, that there was a total failure of allegations as to three of the plaintiffs.

⁹There were three affidavits named in the motion (R. 457): (1) Affidavit of Judge Ashburn of the Superior Court, Los Angeles (R. 83), the sole purpose of which was to authenticate an affidavit made in 1930 by John K. Suckow, the testator of the plaintiff Tobeler and at that time president of the plaintiff Suckow Borax Mines Consolidated, Inc. (R. 85-100); (2) an affidavit of Albert H. Bargion, court reporter in the United States District Court, Southern District of California (R. 100), the sole purpose of which was to authenticate certain proceedings in 1932 in that court; (3) affidavit of Moses Lasky (R. 106-129), the sole purpose of which was to bring before the court some 15 original or certified documents (R. 130-440).

The documents are of three types:

1. Written assertions, charges and accusations made by appellants against appellees in past litigation.
2. Court reporter's transcripts of similar accusations and charges made in open court.
3. Releases by appellants to appellees of all past claims, given after continued assertion of violations of the antitrust laws.

Many of the documents were official records, and certified copies of these were brought before the court. In the case of the other documents, photostatic copies were authenticated by affidavit (R. 106-129) to which they were attached as exhibits (R. 130-440), and the originals were then produced in open court. (Cf. R. 128, 129; R. 646.)

This documentary material was not susceptible of any dispute and was not disputed. It represented immutable facts.

D. Comparison of Issues Here with Those in Burnham Case.

Appellants' case is far weaker than Burnham's case. This action is barred by the statute of limitations for the same reasons as Burnham's case and for others as well. Moreover, appellants have no case for reasons not involved in the *Burnham* case. Here all claims asserted were long ago released. In addition, appellants are seeking to go behind final judgments and retry numerous old lawsuits, since most of the alleged damage for which they seek compensation resulted from the fact that in past litigation in the United States District Court for the Southern District of California judgments, long since final, were entered against some of the appellants in favor of some of the appellees.

E. The Allegations of the Complaint.

The complaint is lengthy and discursive, but its essence is that appellees drove the Suckow company and Suckow out of the borax business by forcing them to cease operating their borax properties and to give up those properties.

The complaint falls into two divisions in respect of time, (a) allegations relating to what occurred up to and including a general settlement and release in the fall of 1934, and (b) allegations of what occurred from 1934 to and including a general settlement and release at the end of 1942.

1. UP TO THE FALL OF 1934.

The complaint alleges (R. 49, et seq.) that in 1926 Suckow discovered a deposit of tincal, a valuable type of borate ore, on property of which he and appellee Borax Consolidated, Ltd. was each the owner of an undivided one-half interest (R. 48, 49).¹⁰ Thereupon, it is alleged, appellee and its associates began to harass Suckow (R. 50), and in order to do so the appellee Borax Consolidated, Ltd., as owner of the undivided half interest in the borate property, began a lawsuit in Kern County in 1927, seeking an accounting and an adjudication of the Suckow's rights to the ore; this suit was dismissed in 1930 (R. 50, 51).

Appellant Suckow company was formed in 1929 and Suckow then transferred to it all his undivided interest in the property on which the borate deposit was located as well as adjoining land on which his plant was situated (R. 51).

It then is alleged that subsequently in 1929 appellees entered into a conspiracy and a plan to destroy the business of Suckow and of the Suckow company (R. 52, para. 82; R. 80, para. 69 as amended).

Certain acts are alleged to have been performed pursuant to this conspiracy: Appellees entered upon a course of conduct to bring about the financial and business destruction of Suckow

¹⁰While the complaint alleges that Suckow discovered certain borate deposits in 1913 (R. 42) and sold interests therein to certain appellants from 1913 to 1925 (R. 42-49), those properties play no further part in the complaint, and it is elsewhere alleged that that type of borate became economically unimportant in 1926 when kernite, a far more valuable type of borate, was discovered (R. 19, para. 41).

and the Suckow company (R. 52, 53). In March 1930 Borax Consolidated, Ltd. began an equity suit in the United States District Court for the Southern District of California against Suckow and the Suckow company to enjoin them from operating and mining the jointly owned properties and for an accounting and damages (R. 53, para. 83(b)). In June 1931 Pacific Coast Borax Company and other appellees instituted bankruptcy proceedings in the Southern District of California against the Suckow company (R. 55, para. 83(c)).

The Suckow company was adjudicated a bankrupt in 1933 (R. 58, para. 83(c)), the Suckow borax properties passed to the trustee in bankruptcy, and in April 1934 the bankrupt's interest in the jointly owned property and in the adjacent acreage on which it had its plant was leased by the trustee to Pacific Coast Borax Company, the owner of the other half interest, for five years (R. 59, para. 83(d)).

It is also alleged that Pacific Coast Borax Company filed a patent infringement suit against the Suckow company which was tried in 1932 (R. 60, para. 83(f)). The various lawsuits between appellants and appellees are then summed up in paragraph 83(g) (R. 61-65).

Thus in 1934, thirteen years before this action was filed, the Suckow company ceased to operate or mine any borate properties or to be in the borax business.

This fact is distinctly alleged. For example, it is alleged (R. 65, para. 84):

"That due to said bankruptcy proceedings and to each, all and every of said other activities of said defendants, or some of them, as herein set forth, and all pursuant to and in furtherance of said 'General Conspiracy' referred to hereinabove, said Suckow and said Suckow Company were destroyed financially and left without means or opportunity further to engage in the said borax business or any of its activities in any form whatsoever, and as a result thereof and by reason thereof,

said Suckow was forced and compelled eventually to make and enter into an *agreement of so-called settlement* with defendant Pacific Coast Borax Company, and which agreement was *dated the 18th day of August, 1934 * * *.*"

It is alleged that under the agreement of August 18, 1934, Pacific Coast Borax Company was to obtain an even more favorable lease from the trustee, and the Suckow company would voluntarily join as lessor. Certain property was to be conveyed outright by the Suckow company to appellees United States Borax Company and Borax Consolidated, Ltd.¹¹ Furthermore, the Suckows were to dismiss all actions against Pacific Coast Borax Company, Borax Consolidated, Ltd. and United States Borax Company and were to

"release all possible claims against said PCB, BCL and USB; in turn it was further provided that said Pacific Coast Borax Company should dismiss or cause to be dismissed all said actions against said Suckow or said Suckow company, and pay said Suckow \$150,000 in a certain manner and upon certain conditions set forth in said agreement. * * *" (R. 66, para. 84.)

The new lease was to be for ten years beginning September 17, 1934 (R. 67). Appellants were to dismiss all appeals from all judgments and orders previously entered against them in favor of appellees (R. 62, 63, 64, 66).

This agreement of August 18, 1934, it is alleged, was fully performed (R. 68, top).

Thus by the end of 1934 Suckow and the Suckow company were completely out of the borax business, and long and diverse litigation with certain appellees was settled by the giving of releases and dismissals of appeals from all adverse judgments.

¹¹It is also alleged that other appellants were to give quitclaims, although it is not alleged that any appellant but the Suckow company had any interest to convey.

2. 1934 TO 1942.

In 1938, while the lease to Pacific Coast Borax Company still had six years to go, the bankruptcy ended, and the Suckow company's assets were returned to it, including the reversion under the lease (R. 69, para. 85).

Only three overt acts are alleged to have occurred after 1934, as follows:

1. That under the lease Pacific Coast Borax Company operated the mine in the jointly owned property "in an unminerlike, inefficient and incompetent manner," so that in 1937, ten years before this suit was filed, a cave-in occurred, and that the lessee continued to mine the property in a careless manner and caused a further cave-in (Compl. para. 87, R. 70; para. 88(d), R. 72).

2. That the lessee used the shafts and tunnels on the property, an undivided half of which it owned and an undivided half of which it leased, to remove ore from adjacent property wholly owned by it, in alleged violation of the terms of the lease (para. 88(b), R. 71).

3. That in December 1942 the Suckow company became discouraged and sold its reversionary interest in the leased property to appellee Borax Consolidated, Ltd. (para. 88(e), R. 73).

When the sale was made, the Suckow company gave another complete release of all claims (R. 74, para. 88(e)). All this was consummated, it is alleged, in December 1942 (R. 75, para. 88(e)). The Suckow company was paid \$350,000 as consideration.

It will be noted that in 1942 and for eight years previously neither Suckow nor the Suckow company had any borax business. The complaint alleges that one of the reasons the Suckow company sold its interest in the leased property was (R. 74, para. 88):

"the fact that all of the former customers of said SBM in England and Holland had been taken over by defendants and

many of the refineries on the European Continent using raw or calcined ore had discontinued their operations for lack of such ore, and the further fact that all of the former European markets of said SBM had been lost through the activities of defendants, or some of them. * * *."

The European market was the only market which, according to the complaint, the Suckow company had ever managed to enter. The Suckow company, shortly after its formation and its acquisition of Suckow's borate properties, made a contract in 1929 with a Dutch refiner called Gembo (R. 51, para. 81). It was through this contract that, according to the complaint, "an outlet [for its ore] was afforded to said Suckow company" (R. 52, para. 81), but, as it is alleged, the Gembo connection was terminated in 1934 (R. 64, para. 83, subd. (g)7).

Thus the complaint affirmatively shows that after 1934 appellants were not in the borax business, that any damage sustained in being driven out of that business had occurred no later than 1934, that in 1942 the only appellant that had any interest was the Suckow company, and that its interest was merely that of a lessor of an undivided one-half of property leased to the owner of the other half under a lease still having two years to run.

In selling this interest, the Suckow company received \$350,000. There are no allegations that the \$350,000 was not the full and fair value of what was sold.

F. The Facts as Shown by the Uncontradicted Documents. In Numerous Lawsuits Pending Years Ago Appellants Accused Appellees of the Alleged Violations of the Anti-Trust Laws Constituting the Basis of the Present Suit.

In the *Burnham* case this Court quoted with approval the statement of the District Judge, made when granting the summary judgment of dismissal, as follows (170 F.2d 569, 573, fn. 4):

"All of the evidence shows both knowledge and good cause to believe on the part of the plaintiff * * * that its business had been damaged by acts of the defendants in violation of the Anti-trust Laws. * * * Statements in writing and under oath by the witness Burnham, who was the managing president of the plaintiff, commencing in 1925 and continuing throughout the years to 1940, show without dispute a continued awareness and knowledge of the plaintiff's cause of action set out in the complaint. Not only that, but these writings make continuous claim as to the responsibility of the defendants for the loss and damage caused to the plaintiff's business. Consequently, no mere lip service to the contrary can rise to the dignity of creating a factual conflict for resolution by the trier of the fact."

With a mere change of names these remarks apply with even greater force to the present case.

Here the assertions from the mouths of the appellants and their predecessors in interest were made repeatedly in the most solemn form in judicial proceedings in numerous lawsuits pending years ago between them and some of the appellees. In these lawsuits the present appellants made against the present appellees the very accusations of violations of the antitrust laws which constitute the foundation of their present complaint.

We set up the facts here in chronological order, to let them speak for themselves. Since the documents are very long, it may assist the Court for us to extract and quote pertinent passages, even at the risk of appearing to do so at some length.

1. JANUARY 13, 1930. RELATIVE TO THE CASE OF BORAX CONSOLIDATED, LTD. V. JOHN K. SUCKOW, NO. 20694, SUPERIOR COURT, KERN COUNTY.

In paragraph 80 of the complaint (R. 50) reference is made to the case of *Borax Consolidated, Ltd. v. John K. Suckow*, No. 20694, Superior Court, Kern County, it being alleged that the action was instituted to harass Suckow.

In January 1930, Borax Consolidated, Ltd. applied to the Superior Court in Los Angeles for a subpoena to take Suckow's deposition in this Kern County action (R. 83). On January 13, 1930 Suckow executed and presented an affidavit in opposition to the application. That affidavit is in the record at R. 85-96.

In that affidavit, executed 18 years ago, Suckow asserted many of the charges made in the present complaint. For example, he said [R. 86, and paras. 13-15, R. 93-96]:

"* * * said Borax Consolidated, Ltd., and its subsidiary corporations [United States Borax Company and Pacific Coast Borax Company] are now, and for many years past have been, familiarly known in the business of producing and distributing borax and the products of borax as the 'Borax Trust.' .

* * * * *

"* * * that affiant is informed and believes, and therefore alleges *that through an agreement of the large producers of borax throughout the world, production was curtailed and competition was eliminated, with the direct consequence that the price of refined borax rose from Forty Dollars in or about 1905, to One Hundred Fifty-five (\$155.00) Dollars a ton in or about 1921; that * * * between the years 1905 and the years 1920 and 1921, the supply of crude borax throughout the world was practically controlled by said Borax Consolidated, Ltd., and its subsidiaries commonly referred to as aforesaid as the 'Borax Trust'; that * * * through competition between the said Borax Trust and other producers of borax and particularly through the competition of American Potash & Chemical Company [one of appellees here], the price of refined borax decreased from approximately One Hundred Fifty-five Dollars a ton in 1921 to Forty (\$40.00) Dollars a ton in December of this year; that affiant is informed and believes, and therefore alleges that said Borax Consolidated, Ltd., and its said subsidiaries commonly called as aforesaid the 'Borax Trust,' is again endeavoring to control and curtail production and eliminate competition by agreement and otherwise; that affiant was approached in December of this year by C. M. Rasor, Engineer and Agent of the Pacific Coast Borax*

*Company, and in charge of the affairs of said company in this county, and requested by said C. M. Rasor to curtail production of ore; * * * that affiant declined to enter into such arrangement with said Pacific Coast Borax Company to curtail said production and to eliminate competition of the said Suckow Borax Mines Consolidated, Inc., and said Borax Consolidated, Ltd., and its said subsidiary Pacific Coast Borax Company; that subsequently to the month of December, 1929, the price of refined borax rose from approximately Forty Dollars a ton to between Fifty and Sixty Dollars a ton; that affiant is informed and believes, and therefore alleges that said increase in the said price of refined borax is directly due to some agreement between producers of crude borax and said Borax Consolidated, Ltd., and its said subsidiaries known as aforesaid as the 'Borax Trust.'*

*"(14) That an inspection of the contract between said Suckow Borax Mines Consolidated, Inc., and said N. V. Chemische Fabriek 'Gembo' is desired by said Borax Consolidated, Ltd., pursuant to its plan and purpose as aforesaid of curtailing the production of crude borax throughout the world and eliminating competition among the producers of said crude borax and thereby raising the price of said crude and refined borax to the consumer; * * * that an inspection of said contract is desired by said Borax Consolidated, Ltd., * * * in order that affiant and said Suckow Borax Mines Consolidated, Inc., may be harassed in the sale and distribution of its share of said ore produced from said property first hereinabove particularly described.*

*"(15) That an inspection of said contract * * * will afford said Borax Consolidated, Ltd., and its said subsidiaries, known as aforesaid as the 'Borax Trust,' the opportunity desired by said Borax Consolidated, Ltd., to eliminate affiant and said Suckow Borax Mines Consolidated, Inc., as a competitor in the production and distribution of crude and refined borax, and of unfairly harassing and annoying affiant and said Suckow Borax Mines Consolidated, Inc., in carrying out contracts entered into between said Suckow Borax Mines Consolidated, Inc. and its customers."*

2. JULY 14, 1930: IN BORAX CONSOLIDATED, LTD. V. SUCKOW BORAX MINES CONSOLIDATED, INC., JOHN K. SUCKOW, ET AL., NO. C-107-M,¹² U. S. DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

The above action is referred to in the complaint in the present case in paragraph 83, subdivision (b) and (g) (R. 53, 61), as one of the suits brought by appellees against appellants as part of the conspiracy to drive them out of business.

On July 14, 1930 Suckow and the Suckow company filed their answer, verified under oath by Suckow. A certified copy is in the record at R. 130-155.

In that answer Suckow and the Suckow company charged:

"Allege that there have been at all times since the work commenced for developing said mine controversies between said Plaintiff and the said John K. Suckow and said corporation defendant relative to the proper conduct and the operation of mining the said ore and conducting the said mining operations; * * *. That these defendants allege that they are informed and believe and therefore state that said *Plaintiff does not desire to have any ore produced from said mine on said lands and premises in Plaintiff's Bill herein described by reason of the fact that said Plaintiff owns and operates other borax properties in which neither of these defendants nor any of them have any interest and does not desire and will not permit if it can prevent the same, any ore to be produced from said property in said Bill described or said mine in competition with ore produced by Plaintiff from its other properties.* That the said Plaintiff has at all times discouraged the development of said mine and has at all times indicated its desire that said mine be shut down and that no ore be produced therefrom. * * * [R. 135].

* * * * *

"Allege that these defendants are informed and believe and therefore state that the said refusal to assent thereto *was pursuant to a plan and purpose of the said Plaintiff to pre-*

¹²Sometimes referred to as C-107-H, the case having come before both Judge McCormick and Judge Hollzer.

vent the said Defendant John K. Suckow and said Suckow Borax Mines Consolidated, Inc. as his successor in interest, from producing any ore from the said mine and to prevent such ore from coming in competition in the market with ore produced by said Plaintiff and its affiliated companies from other properties and thereby creating a monopoly in the production and sale of ore of similar character, to wit: borax, in the said Plaintiff." [R. 149]

3. DECEMBER 8, 1932: SAME SUIT, C-107-M.

On December 8, 1932 Suckow and the Suckow company filed an "Answer to Bill in Equity as Amended." A copy appears at R. 156-166.

In the *First Affirmative Defense* Suckow and the Suckow company made exactly the same accusations against defendants of violation of the Sherman Act as they do in the present case. We respectfully ask the court to compare the assertions made by Suckow and the Suckow company in 1932 with the allegations appearing in the present complaint from R. 49, line 27, to R. 64, line 12. The sham nature of the excuses now made for delay in suing becomes at once apparent. We quote from this 1932 document (R. 156-158):

"Plaintiff herein, Borax Consolidated, Ltd., United States Borax Company, and Pacific Coast Borax Company, and each of them (hereinafter referred to collectively as the 'Borax Trust'), are corporations * * *. The activities of said Borax Trust, as above set forth, are world wide in their scope and extent and involve interstate commerce and trade with foreign nations.

"2. *It is and was at all times herein mentioned a part of the fixed design and general policy of said Borax Trust to dominate and control both the extent and amount of production of borate products, and as well the price or prices at which the same should or might be sold in the markets of the world, thereby to secure a monopoly with respect to the production and marketing thereof, wholly for its own gain and*

to the detriment of its competitors and of the general public. Pursuant to said fixed design and general policy said Borax Trust has at all times herein mentioned established, settled and fixed, and does now by agreement and understanding between its members aforesaid establish, settle and fix, the prices of said borate products from time to time in such manner as to preclude and to prevent free and unrestricted competition in the production and marketing of the products aforesaid. Said members of said Trust have likewise at all times herein mentioned combined, confederated, conspired and agreed, and do now combine, confederate, conspire and agree, among themselves, each with the other and in restraint of free trade and competition, to pool, combine and unite their several interests and facilities in connection with the production, marketing and sale of said borate products in such a manner as to affect, control and dominate the price or prices thereof to the consumer and to the manufacturing world in general, and thereby to stifle competition with regard to such production, marketing and sale thereof."

The answer then alleged the ownership by Suckow and the Suckow company since 1922 of borate properties and the discovery in 1927 of a very valuable deposit of ore and continued (R. 159-165):

"By reason of the foregoing facts and in view of the policy and practices of the Borax Trust, as hereinabove set forth, and with a view to obtaining a monopoly upon and sole control of the valuable tincal deposit aforesaid, the members of said Borax Trust entered into the plan and conspiracy hereinafter set forth.

*"5. Defendants are informed and believe, and hence allege that in or about the month of September, 1927, and immediately following the discovery by defendant John K. Suckow of the tincal deposit hereinabove referred to, the members of said Borax Trust, * * * did combine, confederate, conspire and agree among themselves, each with the other, to obtain at any cost and by any means the exclusive possession, control and domination of said tincal deposit*

* * *. It was a part of said combination and conspiracy, and said members of said Borax Trust did then and there agree in furtherance thereof to harass and to annoy defendant John K. Suckow and/or his successor or successors in interest in and to said real property (hereinafter referred to as defendants Suckow), and each of them, with vexatious, protracted and costly litigation, said conspirators and each of them then and there well knowing that the financial condition of defendants Suckow was insufficient to withstand the cost of such litigation and that the resources of said Borax Trust were limitless. It was likewise a part of said combination and conspiracy, and said members of said Borax Trust did also then and there agree in furtherance thereof, to hamper and hinder the activities of defendants Suckow in working the tincal deposit aforesaid through the medium of injunction suits directed toward the cessation of mining operations of these defendants upon said property, and likewise directed toward the prevention of the fulfillment by said defendants of contracts for the sale of said borate ore theretofore entered into by them, and likewise through the medium of applications for the appointment of a receiver or receivers to take over the management and possession of the property in question,

* * *. It was likewise a part of said combination and conspiracy, and said members of said Borax Trust did also then and there agree in furtherance thereof, to hamper and hinder the activities of defendants Suckow in working the tincal deposit aforesaid through the medium of procuring the institution of a bankruptcy proceeding against said defendants, thereby ultimately to buy up said property at a trustee's sale and at a grossly disproportionate price in the event the bankruptcy of said defendants should be adjudicated in such proceeding. It was likewise a part of said combination and conspiracy, and said members of said Borax Trust did also then and there agree in furtherance thereof, each with the other, that the members of said trust should cause to be filed in the bankruptcy proceeding aforesaid an unjust and excessive claim against the alleged bankrupt therein, thereby to obtain an unlawful preference over the general creditors of said defendants Suckow. It was likewise a part of said combination and

conspiracy, and said members of said Borax Trust did also then and there agree in furtherance thereof, each with the other, that the members of said Borax Trust should, in any and all litigation to be instituted by any of its members as aforesaid against the defendants Suckow, * * * endeavor to establish the value at the mine mouth of ore produced from the above mentioned property at * * * \$22.50 per ton, thereby to secure a large and excessive judgment * * * against said defendants, while at the same time aiding and abetting the petitioning creditors in any bankruptcy proceeding that might be filed against said defendants Suckow in establishing such ore value to be at or in the neighborhood of \$2.50 per ton, thereby to aid in procuring an adjudication of bankruptcy as against said defendants, together with * * * the opportunity to buy in the property aforesaid at a trustee's sale in bankruptcy at a cost of little or nothing, in comparison with the true value of said property. * * *

"6. Pursuant to and in furtherance of said combination and conspiracy:

"6.1. Plaintiff herein did on or about September 21, 1927, institute an action in the Superior Court of the State of California, in and for the County of Kern, * * * wherein plaintiff sought an accounting * * * and * * * to enjoin said defendant from further operations. * * *

"6.2. Thereupon plaintiff herein did on or about March 29, 1930, institute the present suit, praying in its bill of complaint herein *inter alia* that an accounting be had and that defendants and each of them be enjoined from operating the property hereinabove described * * *.

"6.3. Said Borax Trust * * * did on or about June 30, 1931, procure and cause the filing of an involuntary petition in bankruptcy against defendant Suckow Corporation by certain creditors thereof, all for the purpose of harassing and annoying said defendant, * * * ultimately buying up said property * * * at a gross undervaluation * * *.

"6.4. During the trial of the present suit * * * plaintiff herein endeavored to establish * * * the value at the mine mouth of ore produced from the above mentioned property as being at or in the neighborhood of \$22.50 per ton, and

said plaintiff * * * sought, and now seeks, to obtain a judgment * * * against these defendants * * * upon the basis of the aforesaid tonnage value.

"6.5. Defendants and each of them are informed and believe, and hence allege that subsequent to June 30, 1931, *said Borax Trust and its respective members did aid and abet the petitioning creditors in that certain bankruptcy proceeding * * * in establishing the ore value at * * * \$2.50 per ton, * * * with the intent and design * * * to aid in procuring an adjudication of bankruptcy * * * and thereafter to file a claim in said proceeding * * * predicated upon a finding of value in this present suit, upon the basis of \$22.50 per ton, * * *. It was also then and there the intention of the members of said trust to force said defendant corporation out of business through the use of the means and methods aforesaid, and ultimately to purchase the property hereinabove described at forced sale in bankruptcy at a sum far below its true value.*

"7. *Defendants allege that the aforesaid activities of said Borax Trust have resulted in their being crippled financially, and that only the interposition of a court of equity will prevent the consummation by said Borax Trust of the purposes of said conspiracy and combination and the successful attainment by said Trust of the aims, purposes and designs thereof, to-wit: The elimination of these defendants and each of them as competitors in the production and marketing of borate products; the maintenance by said Borax Trust of their policy in fixing, controlling and dominating prices through the elimination of a competitor as aforesaid, and the obtaining of the real property hereinabove described, together with the valuable tincal deposit therein contained, at a price utterly disproportionate to its true value, all of which was duly foreseen and contemplated by the members of said Borax Trust at the inception of said combination and conspiracy.*"

4. DECEMBER 26, 1932: SAME SUIT, C-107-M.

On December 26, 1932 in resisting a motion to strike the above answer the attorneys for Suckow and the Suckow company

made the following charges in open court before Judge Hollzer (R. 101, 102)¹³:

"Mr. Tuller: * * * We set up by allegations—appropriate allegations, beginning on page 33 of this answer that *this whole thing is a part of a plan to throttle competition and create a monopoly in the United States and subject the people of the United States to the evils of monopoly in the dealings in borax. In other words, that this is a part of the plan to bring about an unlawful and illegal result; and that this court is being used to aid in accomplishing that unlawful purpose.* * * * this whole plan and purpose, including the prosecution of the bankruptcy proceedings is a part of a plan to bring about an unlawful monopoly in restraint of trade by destroying or preventing of at least potential competition in dealing in borax in this country that comes from the ownership of this property by the Suckow Borax Company, one of the defendants. The matter is set up fully. We have shown the situation of the borax industry in this country, the combination that we allege, upon information and belief, exists and the purpose that we allege, upon information and belief, exists. If it is true, *it constitutes an absolutely illegal proceeding in direct violation, not only of the policy of the law, but the statutes of the United States;*"

5. JULY 13, 1933: SAME SUIT, C-107-M.

During the trial of the above suit on July 13, 1933, counsel for the Suckows made these accusations (R. 104)¹⁴:

"Mr. Buren: In that connection, your Honor, I want to call your Honor's attention to what may not have appeared yet on the surface of this case. In my opinion, this is a great deal more than an ordinary lawsuit; there is a great deal more involved in it than an ordinary lawsuit. * * * Your Honor is facing here a grave responsibility which may result in determining the price for future generations of Americans

¹³Set forth in the affidavit of Alfred H. Bargion. Mr. Bargion was the court reporter who reported the argument (R. 100).

¹⁴Also set forth in the affidavit of the court reporter, Mr. Bargion, who reported the trial (R. 103).

and other citizens of the world may have to pay for their borax. *The plaintiff in this case is a huge borax octopus, with its head in the City of London, England, and its tentacles extending all over the world, wherever there is a bit of borax to be found* and have practically all the borax in the world. *This suit* was not filed with the possibility of collecting a few thousand dollars that more or less they might be able to collect from this defendant, but it is *for the purpose of either forcing him to sell out or to put him out of business so they can control all the borax there is in the world.* And we want an opportunity to go into that and show your Honor all we can, at least, as to what is at the bottom of this case."

Counsel who made those statements was Mr. Buren. Mr. Buren was also the Secretary of the Suckow company. (See R. 222, 570, 587.) And he is one of appellants' attorneys in the present case (R. 661; so appears on appellants' opening brief).

6. NOVEMBER 15, 1933 TO NOVEMBER 22, 1933: IN HEARINGS IN LOS ANGELES BEFORE U. S. SENATE COMMITTEE INVESTIGATING BANKRUPTCY PROCEEDINGS IN U. S. COURTS.

In November 1933 a Senate Investigating Committee held hearings in Los Angeles and investigated the Suckow bankruptcy, among others. A certified copy of the transcript as published by the United States Senate is in the record (R. 170-238).

Mr. William Neblett was counsel for the Committee, and two months later, as we shall show, became attorney for Suckow and the Suckow company in its litigation with Borax Consolidated, Ltd. and Pacific Coast Borax Company. Mr. Frank Buren was present throughout the whole of these proceedings and heard everything that was said and charged about the present appellees (so admitted, R. 658, 659). He also testified at these proceedings of 1933 (R. 223). He was the Secretary of the Suckow company and its attorney (R. 222).

Mr. Laugharn, trustee in bankruptcy of the Suckow company (R. 173, 174) stated that Borax Consolidated, Ltd. and Pacific

Coast Borax Company were a monopoly (R. 183). Senator Hebert read a statement by Thomas McManus, first receiver in bankruptcy of the Suckow company, that Pacific Coast Borax Company had launched a campaign of persecution against Suckow and dragged him through bankruptcy (R. 183-186), and that (R. 186):

"As an indication of the length to which the Pacific Co. was prepared to go in its determination to throttle and kill all competition, the author of this report * * * was informed by Mr. Jenifer, vice-president and general manager of the Pacific Co., that this concern had offered Dr. Suckow an independent income for life on the condition that he would not attempt to develop the borax lands in which he owns a one-half undivided interest."

Thomas McManus, under questioning by Mr. Neblett, testified that he told Judge Hollzer (R. 202, 203)

"that I was fully convinced that this petition did not originate in good faith, that I thought it was a conspiracy on the part of people to get control of the company, and that I had grave suspicions as to the Borax Consolidated's interest in the matter."

He testified that another competitor, Western Borax Co. (R. 206, 207)

"told me of the terrible difficulties they were having continuously with the Pacific Coast Borax Co., and they told me that there was no question in their mind that this thing was—this receivership and bankruptcy action—was promoted by the Pacific Coast Borax Co."

He dwelt upon other facts and circumstances which in the present complaint appellants allege they did not discover until recently (R. 207). He also testified (R. 218):

"Colonel Neblett. * * * Let me ask you one question: *From your study of this case, what is your opinion as to the purpose of all of these proceedings? Do we understand your*

testimony to be that the purpose of these proceedings which have been brought against the Suckow Borax Co., numerous in character, were with the intent on the part of the persons prosecuting them to maintain this monopoly in the English concern, known as the Borax Consolidated, Ltd.?

"Mr. McManus. I think that was true, and I think it was the design on the part of certain people to buy this property at a bankruptcy proceeding at practically little or nothing.

"Colonel Neblett. *Well, are you positive now from your investigation that the purpose of all of these proceedings was to maintain the monopoly in the English concern? Is that right?*

"Mr. McManus. *I am very much of that opinion."*

Mr. Buren, the secretary of the Suckow company and its attorney, testified (R. 223) and dwelt on the fact that in the suit of Borax Consolidated, Ltd. against Suckow and the Suckow company, No. C-107-M, ore wrongfully taken by Suckow on property in which plaintiff and defendants were tenants in common was found to be worth over \$20.00 per ton so as to warrant a large judgment against Suckow and the Suckow company, while the same ore was found in the Suckow company's bankruptcy proceedings to be worth only \$2.50 per ton, as a result of which the Suckow company was found to be insolvent (R. 225-229). This is a matter of which appellants make much in the present complaint (R. 56-58).

Mr. Buren then testified (R. 228):

"Colonel Neblett. *In your opinion, what is the reason for the prosecution of these various and sundry suits which have been prosecuted against the Suckow Borax Co.?*

"Mr. Buren. *Well, my opinion is for one purpose only: that is to eliminate a competitor and to acquire a monopoly in the borax business.*

"Colonel Neblett. *And to eliminate a competitor in favor of what person or corporation?*

"Mr. Buren. *Well, what we call the 'Borax Trust'."*

Mr. William Neblett, the Committee's counsel, then summed up his case thus (R. 235-237):

"Colonel Neblett. Well, it has been testified to here on yesterday * * * by three witnesses. And by those three witnesses, certificates were produced which tend to show that the Suckow Borax Co. was a half owner of a very valuable deposit of borax in the Cramer district in Kern County.

* * * * *

"* * * That the Pacific Coast Borax Co., a subsidiary of the London borax company owns a half interest with the Suckow Borax Co. in this valuable borax deposit. This borax deposit is the most valuable deposit in the world. * * * Borax Consolidated of England has a world monopoly on that supply of borax. It seems that all of the mines elsewhere have been abandoned because of the cheapness of operation and higher grade of the product in the Cramer district. The Suckow Borax Co. was operating this mine in which the Pacific Borax Co. own a half interest and the Pacific Borax Co. was operating a mine in the near vicinity, and the *Suckow Borax Co. became a serious competitor of the monopoly; whereupon the Pacific Coast Borax began suit.*

"The Borax Consolidated began suit against the Suckow Co. and then this involuntary petition in bankruptcy was filed.
* * *

"The testimony indicates that all of this litigation and including the involuntary petition in bankruptcy was brought for the purpose of enforcing a monopoly and maintaining a monopoly in the British concern and that the petitioning creditors, represented by this witness, were a part of the scheme or conspiracy to maintain that monopoly by putting the Suckow Borax Co. out of business. I propose to show by this witness, if he will answer my questions, that the suit which he maintained has some ancestry which leads back to the British monopoly."

7. DECEMBER 28, 1933, IN ABOVE-MENTIONED SUIT NO. C-107-M, BORAX CONSOLIDATED, LTD. V. SUCKOW.

On December 28, 1933, Mr. Buren, Secretary of the Suckow company and Suckow's attorney, filed "Defendant, John K.

Suckow's Brief on Retrial of the Cause." A certified copy appears at R. 167-169. In that brief he made these accusations (R. 167):

"As the writer of this brief stated to the Court in the closing moments of this second trial of the cause, there is more back of this case (and that also goes for the bankruptcy case) than has yet come to light. And we have no hesitancy now in predicting that if these two cases ever become the subject of an investigation by some tribunal not bound by the technical rules of procedure which hamper the courts, there will be found to be a more intimate connection between the two cases than could possibly have been even suspected by the Court, and that *it will also be found that the bankruptcy case was the result of a conspiracy, pure and simple, to throw an otherwise entirely solvent concern into bankruptcy.*"

These statements were made about one month after Buren's participation in the proceedings before the Senate Committee.

8. JANUARY 12, 1934: SAME SUIT, C-107-M.

Two months after Mr. Neblett's handling of the Senate investigation and asserting the charges against the present appellees, he became attorney for Suckow and the Suckow company in Case C-107-M. A certified copy of the association of attorneys appears in the record at R. 239.

9. JANUARY 25, 1934: SAME SUIT, C-107-M.

Within two weeks of becoming Suckow's attorney Mr. Neblett filed in said case No. C-107-M a "Memorandum of John K. Suckow on the Findings of Fact and Conclusions of Law Proposed by Plaintiff." A certified copy appears in the record at R. 241-247. Judgment had been ordered by Judge Hollzer in favor of Borax Consolidated, Ltd., and John Suckow was objecting to the proposed findings. In this memorandum Suckow and his attorney made these accusations against Borax Consolidated, Ltd.:

"The finding on Page 4, lines 31 to Page 5, line 5 and Page 5, line 14 state that plaintiff offered to pay half the development costs. Said finding is misleading and untrue in the way the language ordinarily would be understood. The truth of the matter is that the alleged offer was to pay half the costs of developing the property upon the condition that Suckow give them joint possession of the shaft *and enter into a price fixing and price marketing combination (probably a violation of the Anti-Trust Law) with them.* * * * [R. 241-242]

"* * * *The evidence shows plaintiff was trying to put Suckow out of business, together with its other competitors;* * * * [R. 242]

* * * In addition the evidence is overwhelming that plaintiff at no time desired that this described property produce Borax. * * * Plaintiff offered to pay his share only on condition that Suckow let plaintiff control the marketing of said ore. * * * [R. 243]

"*The allegation on Page 7 of the complaint—that Suckow refused to enter into a price fixing and marketing agreement with his competitor—should be explicitly found. Plaintiff's offer was a suggestion that Suckow violate the Anti-Trust Law. All its offers and demands were conditioned upon Suckow joining it in such a violation. These facts as alleged should be explicitly found.* [R. 244]

"* * * This shows, without further evidence that plaintiff's offer to pay half the expense was in fact at all times conditioned upon its unlawful demand that Suckow allow it to control the marketing of said ore. [R. 244-245]

"24. *The allegation on Page 26 of the answer—that plaintiff's actions herein are part of a conspiracy to drive Suckow, his competitor, out of business—should be explicitly found. This is important because it shows plaintiff comes into Court with unclean hands.*" [R. 245]

10. JANUARY 30, 1934: SAME CASE, NO. C-107-H.

On January 30, 1934, in this same litigation, Mr. Neblett, on behalf of the Suckows, wrote a letter to Judge Hollzer of the United States District Court, Southern District of California, asserting (R. 591):

"It must now be apparent to the court that this action and the other litigation fostered and prosecuted by the plaintiff is an attempt to maintain the monopoly which Borax Consolidated has in the borax industry. The destruction of the one competitor of the plaintiff is the only objective of this action.

"True, the plaintiff through its counsel and directing genius, as any good strategist would do, has carefully screened from the court its real intentions, hoping to take, by this ruse, the Suckow ground and hold it fortified by the judgment of this court. * * *

* * * * *

"The plaintiff [Borax Consolidated, Ltd.] is a monopoly of the worst sort. It confesses in its complaint that the great majority of its business is interstate and international commerce. Its acts violate the provisions of Sections 1 to 7 of the Sherman Anti-Trust Law, U.S.C.A. Title 15, page 4, et seq. The plaintiff should be condemned for the ingenious scheme it is using of invoking the aid of the court to frustrate the laws of the nation and to sustain its unlawful monopoly." (R. 593).

11. JANUARY 27, 1934: IN THE MATTER OF SUCKOW BORAX MINES CONSOLIDATED, INC., A CORPORATION, BANKRUPT, NO. 16938-H, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

The case mentioned in the caption is the bankruptcy case referred to in the complaint. On January 27, 1934 the Suckow company, represented by Mr. Neblett and its Secretary, Mr. Buren, filed a petition verified by its president Suckow, seeking an order directing the trustee to lease the bankrupt's estate to the bankrupt. A certified copy is in the record at 584-588

(received in evidence at R. 643, 644). In that petition Suckow and his company repeated the charges that the present appellees were violating the antitrust laws to their damage. They charged (R. 585):

"* * * that Borax Consolidated, Ltd., maintains and controls a world-wide monopoly in the mining, refining, distribution and sale of borax, a household article of general use;

* * * * *

"That in 1930 a suit was commenced entitled 'Borax Consolidated, Ltd., a corporation, v. Suckow Borax Mines Consolidated, Inc., John K. Suckow, et al.' the purpose of which was to establish a lien upon the Suckow Borax Mines Consolidated's undivided one-half of the borax bearing properties for ore alleged to have been taken out by the Suckow interests and not accounted for to Borax Consolidated;

* * * * *

"That in the meantime and on June 30, 1931, the petition in involuntary bankruptcy was filed against Suckow Borax Mines Consolidated, Inc., which is now on appeal.

"That Borax Consolidated initiated all this litigation including the actions named, all and solely for the purpose of maintaining its world-wide monopoly as an English corporation and oppressing, harassing and suppressing its sole competitor that he might be removed from the field of world competition;

* * * * *

"That Borax Consolidated, Ltd., has heretofore and is now harassing and interfering with your petitioner in his management and operation of the borax properties for the purpose of maintaining the British monopoly of an American product; *has demanded from time to time * * * that your petitioner join with Borax Consolidated in the maintenance of a world-wide monopoly by determining the output, fixing the price and regulating the marketing of the products of the Kern County borax deposits, all of which your petitioner has declined to do.*"

12. FEBRUARY 13, 1934: SAME CASE, NO. 16938-H.

On February 6, 1934 Borax Consolidated, Ltd. filed an answer to the foregoing petition for a lease (R. 526-539) and traversed its allegations.

One week later, on February 13, 1934, the Suckow company filed an amendment to its petition and reasserted the same accusations. A certified copy of the amended petition is in the record at R. 588, 589 (offered and received at R. 643, 644).

13. FEBRUARY, MARCH AND APRIL, 1934: SAME CASE, NO. 16938-H.

Thereafter, throughout the months of February, March and April, 1934, hearings occurred in the Bankruptcy Court upon the petition just mentioned. As shown by the affidavit of the Court Reporter who reported those hearings (R. 573, 583; received at R. 643, 644), Suckow's counsel, Mr. Neblett, asserted over and over again the charges of violation of the antitrust laws.

Counsel for Borax Consolidated, Ltd. said (R. 576):

"Mr. Ashburn: All right. I do not want to be misunderstood. I am not here to block a canvass of these issues. They have been bandied around this town for months and months, and if the bankrupt has evidence to prove them as far as I am concerned, he can go ahead and prove them, * * *."

and to this Mr. Neblett responded (R. 576):

"I do not want to be misunderstood either. I claim they are true and I claim those allegations will be proved in the proper proceedings at the proper time."

Obviously the proper time was not 13 years later. Mr. Neblett further asserted (R. 579):

"I expressly state I think the allegations are true and feel they can be proved at the proper time."

14. JULY 18, 1934: BORAX CONSOLIDATED, LTD., PLAINTIFF, V. RUTH E. SUCKOW, JOHN K. SUCKOW, ET AL., DEFENDANTS, NO. 310-J, U. S. DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

On July 18, 1934, in another action between the Suckows and the present appellees, in which all the present appellants or their testator, Suckow, were defendants, the Suckows filed a lengthy answer in which they reasserted in infinite detail all the charges they had previously made. A certified copy is in the record at R. 248-260. In that answer these accusations were made (R. 248):

"Answering paragraph XIX of the bill of complaint, these defendants deny that the offers of the plaintiff to do and perform equity are made in good faith; and in this connection these defendants allege that the present action, and in Equity Action No. C-107-H, more particularly described in the bill of complaint, and numerous other actions and transactions instituted and conducted by plaintiff herein, all as more particularly described in the second separate defense hereinafter set forth and by reference made a part hereof, are but a scheme, plan and device by which plaintiff herein is attempting and has attempted to secure and maintain a monopoly on the production and distribution of crude borax, not only in the United States, but throughout the world, and to acquire the properties of these defendants without just or reasonable compensation and to prevent the competition of these defendants, or any of them, in the production and distribution of crude borax and its products."

And in the Second and Separate Defense (R. 249-260) that answer repeated, almost verbatim, the allegations of the First Affirmative Defense of their Answer to Amended Bill filed in December 1932 in action C-107-M (quoted at pp. 15-19, supra).

This occurred just one month to a day before the general settlement of 1934 was entered into and the general releases were given.

G. The Facts Concerning the Releases.

Appellants gave two sets of releases, one in 1934 and one in 1942.

1. THE 1934 RELEASES.

The complaint alleges (R. 65, 66) that John K. Suckow and Ruth E. Suckow entered

"into an agreement of so-called settlement with defendant Pacific Coast Borax Company, and which agreement was dated the 18th day of August, 1934,"

which provided for a lease of the Suckow operating properties to Pacific Coast Borax Company, conveyances and quitclaims of other properties, dismissals by the Suckows of all actions against Pacific Coast Borax Company, Borax Consolidated, and United States Borax Company, dismissal by the latter of all actions against the Suckows, and cash payment and other consideration to be given to the Suckows, and further provided

"that said Suckow and said Suckow company should * * * release *all possible claims* against said PCB, BCL and USB."

All things required by the agreement were performed, that is, the releases were given (so alleged, R. 68, line 2).

In confirmation and amplification of these allegations the motion for summary judgment brought the documents before the court.

The agreement of general settlement of August 18, 1934 appears at R. 273-412. It was followed by three documents each entitled "General Release of All Claims," one executed on September 12, 1934 by John K. Suckow and Ruth E. Suckow, one on September 26, 1934 by the Suckow company, and another on the same day by Mojave Borax Company, Ltd. These appear at R. 260-273. Thus, all the present appellants or their predecessor in interest gave releases in September 1934.

More will be said of these releases in the discussion to follow.

2. THE 1942 RELEASE.

The complaint alleges that in December 1942, with the consent of the other appellants, the Suckow company sold its reversion as lessor of an undivided half interest in the property to appellant, Pacific Coast Borax Company, the owner of the other half interest, and released all claims, demands and causes of action (R. 75).

The complaint is disingenuous and characterizes the release as covering "any and all claims, demands and causes of action whatsoever not arising out of or under said agreement of sale" (R. 75), but the release was brought before the court on the motion for summary judgment, and it speaks for itself. As we show in the discussion (pp. 68, 69, *infra*) it was all comprehensive and clearly covered claims connected with the sale, if there were any. It is dated December 21, 1942 and appears at R. 413-417. It was given by the Suckow company, the only appellant that then had any interest (see p. 10, *supra*) and was authorized and consented to by the stockholders (R. 423) including appellant Ruth E. Suckow and appellant Tobeler as administrator of John K. Suckow's estate, who were then president and secretary (R. 417).

More will be said of this release later.

H. There Is No Pretense of a Claim Stated on Behalf of Appellants Mojave Borax Company, Tobeler as Executor of Suckow's Will or Ruth E. Suckow.

There were four plaintiffs, the Suckow company, Mojave Borax Company, Ltd., Paul O. Tobeler as Executor of the will of John K. Suckow, and Ruth E. Suckow.

The only allegations in the entire complaint about Mojave Borax Company are that it is a Nevada corporation formed in 1932 (R. 5, para. 4) and that it joined in a quitclaim deed in 1934 (R. 66), but it is not alleged that it had any interest to quitclaim.

The only allegation about Ruth E. Suckow is that she was John K. Suckow's wife at the time of his death and for some years earlier (R. 6, para. 6) and joined in the quitclaim deed (R. 66). This gave her no standing to sue. If Suckow had any rights at the time of his death, they are represented by Tobeler, his executor.

Suckow himself had no such rights, since the complaint alleges (see p. 6, *supra*) that he transferred to the Suckow company all his interest, title and fee in his operating properties and borax land in March 1929, and it further avers that the alleged conspiracy was thereafter formed.

DISCUSSION

For clarity and convenience we continue to treat the case in its two chronological parts:

1. Relative to all matters alleged to have occurred to and including the general settlement of 1934.
2. Relative to all matters alleged to have occurred thereafter and through the settlement of 1942.

I.

DISCUSSION RELATIVE TO ALL EVENTS ALLEGED TO HAVE OCCURRED THROUGH THE GENERAL SETTLEMENT OF 1934

A. On the Face of the Complaint These Claims Are Barred by the Statute of Limitations.

Since the law on this subject was thoroughly briefed in the *Burnham* case, and since this Court there stated the controlling principles, we shall not rebrief the matter but shall rely on this Court's decision.

1. THE CONTROLLING PRINCIPLES AS LAID DOWN BY THIS COURT IN THE BURNHAM CASE. THE STATUTORY PERIOD IS THREE YEARS AND THE STATUTE RUNS AGAINST EACH OVERT ACT.

In a private party treble damage suit under the Sherman Act the statute of limitations is the applicable statute of the state

wherein the suit is brought. In California it is Section 338, subd. (1) of the *Code of Civil Procedure*, the section applicable to liabilities created by statute other than for a penalty or forfeiture. The period of time is 3 years. The statute begins to run against each item of damage separately, and recovery may be had only for such damage as has been sustained from overt acts occurring within the three-year period immediately preceding the filing of the action.¹⁵

Ordinarily the damage occurs when the overt act is committed, but in any event the statute begins to run relative to each item of damage when the overt act causing that damage is committed regardless of when the damage culminates. As said in *Momand v. Universal Film Exchange*, 43 F. Supp. 996 (Wyzanski, J.), at p. 1006:

"* * * Each time the plaintiff's interest is invaded by an act of the defendants, he has a new cause of action. For that particular invasion he is at once entitled to recover as damages, not only for the injuries he suffers at once, but also for those he will suffer in the future from that particular invasion, including what he has suffered during and will suffer after the trial. * * *"

In affirming, the Court of Appeals for the First Circuit said on December 21, 1948, in *Momand v. Universal Film Exchanges*, 172 F.2d 37, 49:

"We think the trial court properly ruled that a cause of action for each invasion of the plaintiff's interest arose at the time of that invasion and that the applicable statute of limitations ran from that time."

Certiorari was denied in the *Momand* case on May 2, 1949 (336 U.S. 967).

¹⁵To the same effect are the cases cited in footnotes 6 and 7 of this Court's opinion in the *Burnham* case and *Momand v. Universal Film Exchanges*, 172 F.2d 37, 47 (1 Cir.), decided Dec. 21, 1948.

2. THE CLAIMS ARE BARRED ON THE FACE OF THE COMPLAINT.

The bulk of the allegations of the complaint relate to alleged overt acts culminating in alleged damage no later than 1934, 13 years before the suit was instituted (see pp. 6-10, *supra*). At that time appellants went out of the borax business entirely. The cause of action, if any, for damages resulting from these activities accrued no later than that date, and the statute began to run no later than 1934 and barred any claim for relief at least 10 years before this suit was instituted.

3. THE STATUTE OF LIMITATIONS CAN BE RAISED ON THE FACE OF A COMPLAINT BY A MOTION TO DISMISS.

To avoid dismissal appellants argue (Br. 79-81) that the statute of limitations cannot be raised on a motion to dismiss. The argument is without merit.

After the adoption of the Federal Rules of Civil Procedure in 1938 some district judges did hold that the statute could only be raised by answer. But these judges overlooked Rule 9(f) which provides that

"For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter."

2 *Moore's Federal Practice* (2d ed.), p. 1920 states:

"Since time is material under subdivision (f) for purposes of testing the sufficiency of a pleading, a motion to dismiss because the statute of limitations has run may be utilized, without supporting affidavits, whenever the time alleged in the statement of claim shows that the cause of action, whether *ex contractu* or *ex delicto*, has not been brought within the statutory period."

And Moore cites numerous decisions which quoted with approval the same passage from the first edition (1 *Moore*, 1st ed., p. 597). Elsewhere in his work (Vol. 2, 2d ed., p. 2257) Moore discusses the subject more fully and, after noting that the

common-law rule that allegations of time are not material had been changed by Rule 9(f), continues:

"Accordingly, it is now held that the defense of limitations may be raised by motion to dismiss when the time alleged in the complaint shows that the action was not brought within the statutory period."

A great body of cases has reached the same conclusion. Of the many, we cite:

- Berry v. Chrysler Corporation*, 150 F.2d 1002 (6 Cir.);
Kitbcart v. Metropolitan Life Insurance Company, 150 F.2d 997 (8 Cir.), cer. den. 326 U.S. 777;
A. G. Reeves Steel Const. Co. v. Weiss, 119 F.2d 472 (6 Cir.), cer. den. 314 U.S. 677;
Gossard v. Gossard, 149 F.2d 111 (10 Cir.);
Wright v. Bankers Service Corporation, 39 F. Supp. 980 (S.D. Cal.);
Abram v. San Joaquin Cotton Oil Co., 46 F. Supp. 969 (S.D. Cal.).

These cases cite numerous others and thoroughly discuss the subject.¹⁶

It is settled in California that, where the bar appears on the face of the complaint, the statute of limitations may be raised by demurrer, the objection being, in legal effect, that the complaint does not state a cause of action. The common-law rule was that it could only be raised by answer, but the rule in equity was that it could be raised by demurrer. California long ago adopted the equity practice (*Bank of America, etc. Assn. v. Ames*, 18 C.A.2d 311), and, as pointed out in *Abram v. San Joaquin Cotton Oil Company*, supra, the present Federal Rules are modeled largely on the former Equity Rules.

¹⁶Appellants' assertion (Br. 80) that this Court in *Bowles v. Glick Bros., etc.*, 146 F.2d 566, held otherwise is pure fancy. That case is not in point.

4. APPELLANTS' ARGUMENT OF "CONTINUING CONSPIRACY" WAS REJECTED AS UNSOUND IN THE BURNHAM CASE.

As their next attempt to escape the statute of limitations, appellants argue that the gist or gravamen of the cause of action is conspiracy, that there was a "continuing conspiracy," and that the statute of limitations does not begin to run until the last overt act. Parts II, III and V of appellants' brief (Br. 56-60, 63-67) all make this same argument.

The cases relied upon are criminal cases.¹⁷ Exactly the same argument, based on the same citations, was made and rejected by this Court and by the United States Supreme Court in the *Burnham* case and a little later by the First Circuit in *Momand v. Universal Film Exchanges*, 172 F.2d 37, 49, cer. den. 336 U.S. 967 (May 2, 1949) where the court said that the argument was "based on a mis-reading of the criminal cases."¹⁸ The theory of continuing conspiracy applicable in criminal cases is not applicable in civil cases for damages, and, as already noted, the statute runs separately against each overt act.

5. THE ARGUMENT ABOUT "NONDISCOVERY," FRAUD AND CONCEALMENT WAS LIKEWISE REJECTED AS UNSOUND IN THE BURNHAM CASE.

The next argument by which appellants would escape the statute of limitations is that they had no knowledge of the alleged conspiracy until 1944, that the action was one for fraud, and that the conspiracy was "fraudulently concealed" by appellees (Br. 67).

¹⁷The only civil case that appellants cite is *Albert Pick-Barth Co. v. Mitchell, etc. Co.*, 57 F.2d 96. What they state about that case seems to have been copied verbatim from the Burnham company's Reply Brief (p. 6) and its petition for rehearing (p. 6) in this Court. The *Pick-Barth* case involved no question of the statute of limitations. The very passage quoted by appellants shows the distinction between criminal cases and civil actions for damages. It states that to constitute an offense [i.e., criminal violation] under the Sherman Act, it is not necessary to show an overt act, but that in order to create a private cause of action for damages there must be overt acts.

¹⁸Other cases to the same effect are cited in footnotes 6, 7 and 10 of this Court's opinion in the *Burnham* case.

The argument was made in identical form in the *Burnham* case and there rejected. This Court there held¹⁹:

1. That an action for damages for violation of the antitrust laws is not one for fraud. C.C.P. Section 338(4), which tolls the running of the statute of limitations in fraud cases until "discovery," is not applicable.

2. Consequently, the statute of limitations begins to run from the moment a cause of action arose whether the wronged party knew that he had a cause of action or not. Ignorance of the injury or of the facts constituting the injury does not prevent the running of the statute. The fact, if it be a fact, that a plaintiff did not make "discovery" until a later date is irrelevant.²⁰

Thus on the face of the complaint no valid excuse for the delay in suing is even pleaded.

The only allegations relative to delay in suit are that in September, 1944, the United States filed an indictment and bill in equity against some of the appellees charging violation of the antitrust laws and "that it was not until subsequent" to that

¹⁹To the same effect: *Foster & Kleiser v. Special Site Sign Co.*, 85 F.2d 742 (9 Cir.); *State of Oklahoma v. American Book Company*, 144 F.2d 585 (10 Cir.).

²⁰Appellants' brief (pp. 74-79) invokes *American Tobacco Company v. Peoples Tobacco Company*, 204 Fed. 58; *Bailey v. Glover*, 21 Wall. 342, and *Holmberg v. Armbrrecht*, 327 U.S. 392. This section of the appellants' brief is almost a verbatim copy of pages 26-29 of the Burnham company's petition for rehearing in this Court.

The *Holmberg* case merely held that, in a suit in a federal court on a federally created right, state statutes of limitations do not apply in a suit in equity but do apply in an action at law, unless the federal statute contains its own period of limitations. *Bailey v. Glover* held that, if the federal statute prescribes its own period of limitations, it is to be read as including a provision that, if the cause of action is based on fraud, it does not accrue until discovery. Now, the Sherman Act does not contain its own statute of limitations, and, as this Court held in the *Burnham* case, a suit under the Sherman Act is an action at law, not a suit in equity, and it is not an action for fraud.

The *American Tobacco* case arose and was tried in the State of Louisiana. Consequently, the Louisiana law of limitations applied as does California law here. The court there merely applied the Louisiana law, not relevant here.

event "that plaintiffs herein, or any of them, discovered the true facts of the situation presented herein or learned of said 'general conspiracy' referred to hereinabove, or the facts that said defendants herein had violated said Sections 1 and 2 of said Title 15A." (Para. 84, R. 68.) Similar allegations appear in paragraph 89 (R. 76). And in paragraph 91 (R. 77) it is asserted that the conspiracy was a "fraud" upon appellants.

But, as we have seen, the allegation that there was no discovery is irrelevant. And the allegation that the conspiracy was a "fraud" is an erroneous statement of law and not an allegation of fact.²¹ Like the old demurrer, a motion to dismiss does not admit conclusions of law or unwarranted deductions of fact. 2 *Moore's Federal Practice* (2d ed.), p. 2244.

Nothing is left but appellants' further claim of "fraudulent concealment." An action for fraud and fraudulent concealment are two different things. In any action in California the running of the statute of limitations can be tolled by "fraudulent concealment." But, before appellants could reach the question, "fraudulent concealment" would have to be alleged properly.

In the *Burnham* case this Court held that silence on the part of an alleged wrongdoer is not fraudulent concealment, that "mere failure by a defendant to disclose to a plaintiff the existence of the facts does not constitute fraudulent concealment." Fraudulent concealment requires affirmative and positive acts in the nature of artifice to conceal the facts, some trick or contrivance to exclude suspicion and prevent inquiry.²²

The only allegation in the complaint on fraudulent concealment is in paragraph 91 (R. 77) where the bare allegation appears,

²¹Indeed, any attempt to assert fraud rather than violation of the Sherman Act as the gravamen of the complaint in this case would oust a federal court of jurisdiction, because there is no diversity of citizenship. The case comes into a federal court only as an action upon a statutory liability; as such it falls under subdivision 1 of Section 338, C.C.P.

²²To the same effect: *Foster & Kleiser v. Special Site Sign Co.*, supra, and cases cited in footnotes 14 and 15 in the *Burnham* opinion.

"That said 'general conspiracy' was fraudulently concealed by said defendants from plaintiffs and each of them until the time of discovery thereof as aforesaid by plaintiffs."

This allegation is a conclusion of law, without any supporting allegation of fact. The law is settled that a plaintiff who seeks to escape the bar of the statute of limitations on the theory of fraudulent concealment must allege facts and not conclusions, and this Court has so held in the *Burnham* case.²³ There the complaint at least made some pretense of complying with this requirement by averring that the plaintiff had accused the defendants of wrongdoing and that defendants had denied the accusation. That averment was held to be insufficient and shown to be sham. Yet there was not even that allegation here.

B. Dismissal Because of the Statute of Limitations Was Proper on the Motion for Summary Judgment:—Appellants' Excuses for Delay Are Pure Sham.

We have shown that on the face of the complaint the claims were barred by the statute of limitations. But, in addition, the incontrovertible facts demonstrate that the claims of non-discovery and concealment are pure sham. Consequently, dismissal was also proper on the motion for summary judgment.

1. COURTS HAVE CLEAR POWER TO GRANT A MOTION FOR SUMMARY JUDGMENT WHEN THE BAR OF THE STATUTE OF LIMITATIONS IS SHOWN BY UNDISPUTED FACTS OUTSIDE THE COMPLAINT.

In view of this Court's decision in the *Burnham* case and in *Gifford v. Traveler's Protective Assn.*, 153 F.2d 209 (and see 2 *Moore's Federal Practice*, 2d ed., p. 2257), appellants concede (Br. 81) that the bar of the statute of limitations can be raised by a motion for summary judgment. But they resort to the rule that such a motion cannot be granted if there is a genuine issue of fact (Brief 3, 48, 55). That is a truism not pertinent to the case.

²³And see cases cited in footnote 16 in the *Burnham* opinion.

To create an issue of fact, appellants merely argue that on a motion for summary judgment allegations of a complaint must be accepted as true.²⁴ As we have seen (pp. 38 to 40, *supra*), the complaint contains no proper allegations excusing delay in suit. Beyond that, it is settled that the allegations of a complaint are not controlling, the problem being to ascertain from the material offered on the motion for summary judgment whether a genuine issue of fact remains. In the *Burnham* case, this Court affirmed a summary judgment despite allegations in the complaint concerning fraudulent concealment and non-discovery more specific than those here (Cf. p. 40, *supra*). In *Lindsey v. Leavy*, 149 F.2d 899 (9 Cir.), this Court held that:

"The sufficiency of the allegations of a complaint do not determine the motion for summary judgment. Cases dealing with and construing Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, clearly indicate to the contrary and if this were not the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss. For a further discussion of this principle see 3 Moore's Federal Practice, pp. 3174, 3175. The rule is now well established in the many cases dealing with the problem."²⁵

²⁴Most of the cases cited do not even involve motions for summary judgment but merely motions to dismiss based on the pleadings alone; e.g., *Ledbetter v. Farmers, etc. Co.*, 142 F.2d 147; *Willson v. Graphol Products Co.*, 165 F.2d 446; *United States v. Frankfort, etc.*, 324 U.S. 293, which was a criminal case involving a demurrer to the indictment. Another case, *Ansehl v. Puritan etc. Co.*, 61 F.2d 131, was decided in 1932, years before the adoption of the Federal Rules of Civil Procedure under which motions for summary judgment are permitted. Another, *Domestic and Foreign Commerce Corporation v. Littlejohn*, 165 F.2d 235, related to the particular problem of jurisdictional allegations in suits against officers of the United States to avoid the rule that the United States cannot be sued without its consent (see *Land v. Dollar*, 330 U.S. 731, 735).

²⁵In *Associates Discount Corporation v. Crow*, 110 F.2d 126, the court said that on motions for summary judgment, if there are material facts in dispute, the court should "specify in a finding the facts that appeared * * * without substantial controversy, and to go forward with the trial

And see *Piantadosi v. Loew's Inc.*, 137 F.2d 534 (9 Cir.).

The cases that appellants cite to support the contention that allegations of a complaint must be accepted as true have their source, as they show, in *Farrall v. District of Columbia Amateur Athletic Union*, 153 F.2d 647. But the rule as actually stated in that case was that

"if the averment in the complaint is a mere conclusion or a vague generality without specification, and the affidavit asserts facts which are undisputed, and it thus appears that there is in truth no genuine issue of fact, the court may act upon that premise" (p. 648).

A plaintiff may not escape a summary judgment unless there is a *genuine* issue of fact. R.C.P. Rule 56 speaks of the necessity of a "*genuine* issue." 3 *Moore's Federal Practice* (1st ed.), p. 3185, quotes from a case which points out that the rules for summary judgment

"would serve no purpose whatever if frivolous and transparently insufficient proofs and arguments such as have been brought forward here be held to create a triable issue. The already overcrowded trial term calendars would be cluttered up with phantom issues, the disposition of which would usurp and waste the time of the court."

Appellants speak in generalities and neither point nor can point to any concrete issues.

2. THE FACTS ARE UNCONTRADICTED AND INDISPUTABLE. THERE IS NO CONCEIVABLE ISSUE OF FACT.

The material brought forward on the motion for summary judgment created no issue of fact but showed that there was no issue. It did not consist of the testimonial assertions of some affiant, as a witness, susceptible of a testimonial conflict, but of

in respect of those which remained in dispute." If appellants were to attempt to state what factual issues remain for trial, what possibly could they specify?

certified copies of pleadings by the Suckows in court proceedings and of reporter's transcripts of statements made by their attorneys. It consisted of assertions of the present appellants and their predecessors solemnly made in numerous judicial proceedings years ago, wherein the present appellants made against the present appellees the very accusations of violation of the anti-trust laws which they now make.

We shall not repeat but merely refer to the facts stated at length at pp. 10 to 30, *supra*.

None of these facts are denied. And in their very nature they were no more controvertible than the existence of a mountain standing before our eyes can be controverted by denying its presence. Against such proof conclusory material in a complaint can raise no issue.

The facts are similar in character to those upon the basis of which this Court affirmed the dismissal in the *Burnham* case. But, while similar in character, they are much stronger, for Burnham's accusations were made either out of court or in a lawsuit to which the alleged antitrust violators were not parties, while appellants' accusations were made in lawsuits in which appellees were the adversaries.

The facts are also infinitely stronger than those which motivated this Court to hold against a claim of non-discovery and concealment in *Foster & Kleiser v. Special Site Sign Co.*, 85 F.2d 742, an antitrust suit. This Court, in finding that plaintiff had knowledge of sufficient facts to put it on notice, pointed out that 16 years earlier defendant had offered to make the plaintiff's president head of a "country department" and informed him that the purpose of the country department was to crush independent firms (p. 752).

Strikingly similar statements appear in the record here. For example, in November, 1933, Mr. McManus, Receiver of the Suckow company, stated that Pacific Coast Borax Company had offered Suckow an independent income for life on condition

that he would not develop his borax lands (see p. 22, *supra*). Again, Suckow's counsel in January, 1934, asserted that Borax Consolidated, Ltd. had requested Suckow "to enter into a price fixing and marketing agreement" and that Suckow refused because "plaintiff's [Borax Consolidated, Ltd.] offer was a suggestion that Suckow violate the Anti-Trust Law." (See p. 26, *supra*.) And in January, 1934, the Suckows formally alleged under oath in a petition in the bankruptcy court that appellees had repeatedly demanded that appellants join in an anti-trust conspiracy (see p. 28, *supra*).

And we may note again that in the spring of 1934 counsel for Pacific Coast Borax Company in certain litigation challenged the attorney for the present appellants to prove the allegations of violation of the antitrust laws, and counsel for appellants replied that he could prove them and would do so at the proper time (see p. 29, *supra*).

The documents not only show that any claim of lack of knowledge is sham, they demonstrate the same fact about any claim of fraudulent concealment. The only claim of "fraudulent concealment" made below was that certain appellees had denied that they were guilty of violating the antitrust laws when accused by appellants in litigation over 13 years before the present suit was started. As we noted at pp. 28, 29, *supra*, the facts are merely that in February 1934 the Suckow company applied to the Bankruptcy Court for a lease, in its petition accused certain of the present appellees of violating the antitrust laws, and those appellees in their answer to the petition traversed the accusation.

In the *Burnham* case this Court held that denial of an accusation of wrongdoing is not fraudulent concealment. Denial of an accusation by the wronged party that the defendant has injured him by acts in violation of the antitrust laws is not fraudulent concealment. The fact of accusation itself rebuts any contention of "nondiscovery." A person suspecting that a wrong has been

perpetrated upon him cannot stop the running of the statute by going to the alleged wrongdoer and obtaining a statement that no wrong was committed.²⁶

In the *Burnham* case accusation and denial were out of court. Here they were part of pleadings. If a denial in an answer of an allegation in a complaint constituted "fraudulent concealment," a plaintiff in almost any lawsuit could abandon his case and renew it at any future date, however remote, without fear of being barred by the statute of limitations. The claim is absurd.

Moreover, after the appellees made their denial in 1934, the Suckow company filed an amended petition in the bankruptcy court reasserting its accusations and subsequently repeated them in hearings in that matter and in pleadings in subsequent lawsuits (see pp. 29, 30, *supra*). As was noted by this Court in the *Burnham* case (in footnote 4), one who repeats his accusations after an alleged act of fraudulent concealment cannot claim that the statute is tolled; fraudulent concealment rests on principles of estoppel, estoppel requires reliance, and reliance requires belief.²⁷ There is no reliance where one does not believe the denial and continues thereafter to repeat his accusations.

Appellants' Counteraffidavits.

Appellants filed three affidavits in opposition to the motion for summary judgment. None of them questioned any fact brought forth by appellees, and none raised any issue of fact. And appellants' brief does not refer to or rely on them. Consequently, we do not discuss them here. But in order that the matter may be

²⁶And to the same effect, *Feak v. Marion Steam Shovel Co.*, 84 F.2d 670 (9 Cir.), *cert. den.* 299 U.S. 604; *Neff v. New York Life Ins. Company*, 30 Cal.2d 165; *Burchmore v. H. M. Byllesby & Co.*, 1 N.W.2d 327 (Neb. 1941); *Phillips v. Baker*, 114 S.W.2d 421 (Texas 1938); *Jackson v. Buchanan*, 59 Ind. 390.

²⁷To the same effect: *Neff v. New York Life Insurance Company*, 30 Cal.2d 165; 3 *Pomeroy's Equity Jurisprudence* (5th ed.), Sec. 812, p. 230; Sec. 890, p. 502.

fully before the Court, particularly if appellants refer to the affidavits in a reply brief, we consider them in Appendix 2 to this brief.

3. THE ARGUMENT THAT, WHILE APPELLANTS BELIEVED THAT THERE WAS A CONSPIRACY FORMED IN 1927, THEY DID NOT HAVE IN MIND ONE FORMED IN 1929, IS FALSE IN FACT AND IRRELEVANT IN LAW.

Appellants admitted below that they repeatedly accused the appellees of violating the antitrust laws by conspiracy to drive appellants out of business. They also admitted that they knew of the identical overt acts which caused their damage, and that they knew of them when they occurred and knew who committed them. For example, counsel argued:

"Of course the plaintiffs knew what was happening to them. They knew when these people were attempting to destroy the property, the mine; they knew these various things were happening to them. But they did not know that this was the result of this 1929 conspiracy. Every one of these overt acts, as a matter of fact, constituted a conspiracy upon which plaintiffs could sue independently had they elected to do so, but they did not so elect" (R. 647, 648).

In short, appellants sought to escape the facts by contending that they were suing upon a conspiracy formed in a different year from the one they had been charging over the years. Indeed, this was appellants' principal argument below. While it has not been made in appellants' brief, we now discuss it because it shows in a striking way the utter hollowness of their case.

The argument is both false in fact and irrelevant in law.

False in Fact.

1. In January 1930, in litigation in the United States District Court in Los Angeles with some of the present appellees, Suckow filed an affidavit accusing them of a conspiracy *formed in 1929*. We quoted at length from this affidavit at pp. 12, 13, *supra*. Summarizing the quotation, it is alleged that through an agreement of the large producers of borax in 1905 production

was curtailed, competition eliminated and the price of borax increased; that subsequent to 1920 through competition between Borax Consolidated, Ltd. and other producers of borax, including American Potash & Chemical Corporation, the price of borax declined *until December 1929*, and that Borax Consolidated, Ltd. and its subsidiaries "is again endeavoring to control and curtail production and eliminate competition by agreement and otherwise"; that Suckow was approached in December 1929 by an agent of one of the appellees to curtail production and eliminate competition and that subsequent to the month of December 1929 (prior to the filing of the affidavit on January 13, 1930) the price of borax again rose, and that the increase "is directly due to some agreement" between the various producers of borax.

2. Moreover, the complaint itself alleges that the alleged 1929 agreement was nothing but a reduction to writing of previous conspiracies. Paragraph 73 of the complaint alleges (R. 38):

"that said '1929 agreement' constituted a reduction to writing of the previous verbal and written agreements, understandings, combinations and conspiracies of defendants and, from time to time made and entered into by said defendants during the years previous to the making and entering into of said 'agreement of 1929'."

Being confronted below with this allegation, appellants rushed in with a Second Amendment to the Complaint purporting to amend paragraph 73 by withdrawing it completely and substituting a wholly different allegation (R. 82). That amendment cannot aid appellants. An amendment which does not seek to cure a defective complaint by adding a missing allegation but seeks to omit an allegation injurious to the pleader's case is held to be sham. *Silica Brick Co. v. Winsor*, 171 Cal. 18, 22; *Treager v. Friedman*, 79 C.A.2d 151, 172.

Irrelevant in Law.

1. A similar argument was made in the *Burnham* case (see pages 2-4 of Burnham's brief in reply to brief of Borax Consolidated, Ltd.). It was rejected. There the plaintiff admitted that it knew that it had sustained damage and that the defendants had caused that damage, but claimed that it did not know that defendants had acted in conspiracy. A similar excuse was rejected in *Strout v. United Shoe Machinery Co.*, 208 Fed. 646, cited by this Court both in the *Burnham* case and in the *Foster & Kleiser* case, *supra*. In the present case appellants' argument is weaker. Appellants have not only admitted that they knew all that Burnham knew but they admitted what Burnham denied, namely, that they believed and were convinced that the overt acts were committed in pursuance of a conspiracy in violation of the antitrust laws; all that they claim they did not know was that the conspiracy was formed in one year instead of another. The excuse having been rejected in the *Strout* and *Burnham* cases as insufficient, the infinitely weaker excuse here is even more insufficient.

2. Moreover, *in law* appellants' alleged cause of action is not for a conspiracy formed in 1929, or for a conspiracy formed at any time, but for damage resulting from certain overt acts. (So held by this Court in the *Burnham* case, and see pp. 37, *supra*, and 71, 72, *infra*.) Whether those acts became actionable by reason of a conspiracy formed at one date rather than another would not change the cause of action. The cause of action would be the same.

An all-conclusive answer to appellants' contention will be found in *F. L. Mendez & Co. v. General Motors Corp.*, 161 F.2d 695 (7 Cir.), cert. den. 332 U.S. 810. There plaintiff alleged that it had been the owner of a retail automobile dealership which it held from defendant's subsidiary and that the defendant cancelled the agreement. Plaintiff first sued on the claim that this

was done pursuant to and as part of a conspiracy in restraint of interstate commerce and sought treble damages under the Sherman Act. Judgment having gone for defendant, plaintiff sued again, alleging the same facts but claiming that the cancellation of the dealership was wrongful, not because it was made in pursuance of a conspiracy illegal under Title 15 U.S.C. Sec. 1 (the Sherman Act), but under Title 15 U.S.C. Sec. 14, a section of the Clayton Act, unrelated to conspiracy.

The complaint was held properly dismissed on the ground that the cause of action alleged in the second case and that alleged in the first case were one and the same; thus the judgment in the first case was *res judicata*. Plaintiff contended that the two suits required different proof. The Circuit Court held that they were nevertheless the same cause of action. The entire opinion of the court is pertinent, but we quote only briefly:

"The fact that in one case defendant's repudiation of the contract was alleged to have been wrongful for one reason and in the other for another reason does not alter the fact that the cause of action was for the same injury,—wrongful cancellation of the franchise." (p. 697)

The court distinguished criminal prosecutions from civil actions. While the United States could separately prosecute the defendants for violating the Clayton Act and the Sherman Act, "for each violation constituted a separate offense," (p. 698):

"We are dealing with a civil suit in which the private right of plaintiff has been, as it says, unlawfully taken from it. It has one right and one only; the right to enjoy its contract. It complains of one wrongful act, namely, deprivation of that right. Its action is not for recovery under the Sherman Act or for recovery under the Clayton Act but for recovery for the wrongful cancellation of its property right. The gist of its action is its injury arising from alleged wrongful deprivation of its contract right."

Thus in the *Mendez* case two suits were held to be on the same cause of action because the overt acts and the damage

were the same, and it was held to be irrelevant that those acts were made illegal in one case by a conspiracy in restraint of trade and in the other, not by such a conspiracy, but by the intention to force plaintiff not to deal in goods of a competitor. The principle applies with infinitely greater force here. In this case appellants' cause of action was to recover for damages arising from certain overt acts, said to be illegal by reason of a conspiracy in restraint of trade. Whether those overt acts were illegal because the conspiracy was formed in one year instead of in another is of no consequence.

3. If one believes that he has been defrauded on one material matter, he may not rely on other representations by the wrongdoer. *Evans v. Duke*, 140 Cal. 22; *Nicolaisen v. Toffelmier*, 97 Cal. App. 342. By analogy, where one seeks to toll the statute of limitations because of fraudulent concealment, reliance is necessary, and since appellants believed that appellees had committed acts to their damage under a conspiracy illegal under the Sherman Act (regardless of when formed), they were not relying on appellees and would have had no right to do so. As shown at pp. 20, 22, 26, 27, supra, in 1933 and 1934 they were accusing the appellees of acting in bad faith and of resorting to "ruses" and "ingenious schemes" to hide what they were doing. Cf. *Turman v. Holmes*, 29 C.A.2d 198.

Indeed, appellants are in a dilemma. The only fraudulent concealment claimed is denial by appellees of appellants' accusations. If the accusations had to do with a conspiracy formed in 1927 and not in 1929, then the only denial was of a 1927 conspiracy. If a suit on a conspiracy formed in 1929 is not the same as that which was involved in the accusation, there was never a denial of what is now charged. If it is the same, the denial was not believed. In either event, there was no "fraudulent concealment."

C. The Claims Were Released, a Fact Not Only Shown on the Face of the Complaint but Indisputably Established by the Documents Filed in Support of the Motion for Summary Judgment.

As we showed on p. 8, *supra*, in August 1934 Suckow's borax properties were leased to certain appellees, the Suckow company went out of business, and in September 1934 all appellants or their predecessors gave releases. As a consequence all claims have been forever released.

1. ALL APPELLEES WERE RELEASED.

The releases explicitly released by name Pacific Coast Borax Company, Borax Consolidated, Ltd. and United States Borax Company and "their and each of their stockholders, directors, officers, agents, servants, employees, attorneys-in-fact and attorneys at law." (R. 260, 263, 268). Thus the releases covered C. M. Rasor, testator of appellee Bank of America N. T. & S. A., and appellees Frank M. Jenifer and James M. Gerstley, they being such officers and employees (cf. R. 56, 301).

Since a suit for treble damages for violation of the antitrust laws is a tort claim (*Clark Oil Company v. Phillips Petroleum Company*, 148 F.2d 580, 583 (8 Cir.) cer. den. 326 U.S. 734; *Northwestern Oil Company v. Socony Vacuum Oil Company*, 138 F.2d 967, 971 (7 Cir.) cer. den. 321 U.S. 792; *Williamson v. Columbia Gas & Electric Corp.*, 110 F.2d 15, 18 (3 Cir.) cer. den. 310 U.S. 639), all the other appellees were likewise released from any claim for participation in the alleged conspiracy, under the elementary principle that the release of one joint tortfeasor releases all others. *Bee v. Cooper*, 217 Cal. 96 (a conspiracy case); *Restatement of Torts*, Sec. 885. Thus Stauffer Chemical Company, and West End Chemical were released of claims that may have arisen, if any, from alleged participation in the conspiracy.

2. THE RELEASES WERE ALL-COMPREHENSIVE.

Each of the releases specified that it covered (R. 261, 263-4, 269-70).

"any and all actions and causes of action, claims and demands whatsoever, whether or not well founded in fact or in law, and of and from any and all manner of suits, debts, dues, sums of money, accounts, reckonings, * * * controversies, agreements, promises, trespasses, damages, judgments, executions, claims and demands whatsoever in law or in equity which * * * the undersigned has had or now has or which they or their heirs, executors, administrators or assigns hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever, whether herein specifically mentioned or otherwise, from the beginning of the world to the date of these presents; *and full satisfaction of all of said claims, demands, causes of action, suits, debts, dues, sums of money, accounts, reckonings, * * * controversies, agreements, promises, trespasses, damages, judgments and executions, is hereby acknowledged.*"

3. THE DEFENSE OF RELEASE MAY PROPERLY BE RAISED ON MOTION TO DISMISS AND FOR SUMMARY JUDGMENT.

Appellants' discussion of the subject of release is sketchy (Br. 82-84). The principal argument by which they would avoid the effect of the releases is the contention that the defense can only be raised by answer and may not be raised by motion to dismiss or motion for summary judgment.

The only case cited, *Jack Mann Chevrolet Co. v. Associates Inv. Co.*, 125 F.2d 778 (6 Cir.), holds nothing of the sort.

If the facts constituting any affirmative defense appear in the complaint, as here, or are established without dispute, leaving no genuine issue of fact, also as here, the defense can be raised by motion. This Court has so held in *Gifford v. Travelers Protective Association of America*, 153 F.2d 209 (9 Cir.).

As 2 *Moore's Federal Practice* (2d ed.), Section 8.28, page 1698, says:

"Rule 8(c) might seem to imply that affirmative defenses may be raised only by a pleading (where one is required or permitted) and not otherwise. This, however, is too narrow a construction of the rule. A defendant may move for summary judgment under Rule 56 where 'there is no genuine issue as to any material fact' and he 'is entitled to a judgment as a matter of law'; and it is clear that summary judgment is proper where the defendant shows the existence of an affirmative defense even though he has filed no answer. Under the 1946 amendment to Rule 12(b), it is also made clear that a defendant may raise an affirmative defense by a motion to dismiss for failure to state a claim; and that the court may treat such a motion as a motion for summary judgment. Prior to this amendment, most courts had held that an affirmative defense might not be raised by motion where the defense did not appear on the face of the complaint, although some courts sanctioned the use of the 'speaking motion' to show facts negating plaintiff's claim. By analogizing the motion to a motion for summary judgment, however, the amended Rule 12(b) clearly permits affirmative defenses to be raised by motion."

Moreover, in the instant case the fact of releases was not new matter first brought into the case by the motion for summary judgment. The releases were alleged in the complaint, and the motion merely brought forward the documents themselves. If the summary judgment procedure could not perform that office, it would be a futile addition to federal practice. Cf. *Lindsey v. Leavy*, 149 F.2d 899 (9 Cir.).

**4. APPELLANTS' ALLEGATION TO ESCAPE THE RELEASES IS IRRELEVANT.
A RELEASE SPECIFYING UNKNOWN CLAIMS IS EFFECTIVE TO RELEASE
CLAIMS THOUGH UNKNOWN.**

The complaint alleges (R. 67) that at the time of execution and performance of the August 1934 agreement the appellants and John Suckow did not know of the conspiracy or appellees' alleged violation of the antitrust laws. This allegation is the only one in the complaint by which appellants seek to avoid the effect of the releases.

It is irrelevant, because the releases intentionally released all claims whether known or unknown.

The releases recite:

"It is the *specific intent and purpose hereof to release and discharge any and all claims* and causes of action of any kind or nature whatsoever, *whether known or unknown* and whether specifically mentioned herein or not, which may exist or might be claimed to exist at or prior to the date hereof, and the undersigned specifically waives any right or claim of right to hereafter assert that any cause of action or alleged cause of action or claim or demand of any nature or kind whatsoever has been, through oversight or error or intentionally, or unintentionally, omitted from this release.

"The undersigned further state and agree that they have read this instrument in full; that they fully understand the same and have executed it freely and in consideration of the payment or promise of payment of certain moneys by Pacific Coast Borax Company to John K. Suckow and Ruth E. Suckow, or one of them." (R. 261, 264, 269, 270).

Two of the three releases were executed by Frank Buren, as Secretary of the Suckow company and of Mojave Borax Company, and Buren is an attorney at law and is one of appellants' counsel (see p. 21, *supra*).

Appellants cite Civil Code Section 1542 that

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

This section refers only to a "general release." It does not pertain to a release expressly providing that it covers all claims whether or not known or suspected at the time. Such is the express provision of the releases in the present case.

A release which specifically covers unknown claims is fully effective and does not fall within Section 1542. *Berry v. Struble*, 20 C.A.2d 299 (rehearing by Supreme Court denied); *Pacific*

Greyhound Lines v. Zane, 160 F.2d 731 (9 Cir.) (treating of Sec. 1542).

The release being before the Court, it speaks for itself, and no issue as to its meaning can be raised by characterizations in the complaint. Cf. *Zeligson v. Hartman-Blair, Inc.*, 126 F.2d 595 (10 Cir.).

5. APPELLANTS' ALLEGATION TO ESCAPE THE RELEASES IS FALSE AND SHAM. APPELLANTS WERE AWARE OF THEIR CLAIMS.

The allegation was sham as well as irrelevant. As we have shown (pp. 11-30, *supra*), for years preceding these releases various litigation between the Suckows and the appellees Borax Consolidated, Ltd., Pacific Coast Borax Company and associated companies had been pending in various courts, and in that litigation, *since as early as January 1930, the Suckows and the Suckow company and Frank Buren, its Secretary and attorney, repeatedly accused those appellees of conspiracy and of violation of the antitrust laws to their damage.*

The releases were given as part of the general settlement agreed to on August 18, 1934 (see pp. 8, 31, *supra*). *But only one month before—on July 18, 1934—in one of these actions in the United States District Court for the Southern District of California, between Borax Consolidated, Ltd. as plaintiff and the Suckows as defendants, the latter filed an answer repeating these accusations in great detail (see p. 30, supra). The releases were part of a complete and total settlement of all this litigation, of all these controversies, and of all these asserted claims, charges, accusations, and counter-charges that had been going on for years. Having been subjected for years to litigation, charges and accusations, including accusation of violation of the antitrust laws, Borax Consolidated, Ltd., Pacific Coast Borax Company and their associates were "buying their peace," they were buying a release from all such claims.*

That the agreement of August 18, 1934, was a complete settlement of all controversies is demonstrated by a summary

of the agreement which we attach to this brief as Appendix 1, which also shows that a very substantial consideration was given amounting by way of cash and cross-releases of judgments and claims to more than \$600,000.

Section 1542 of the California Civil Code, cited by appellants and quoted above, contains the words "or suspect" and shows that even a mere general release which fails to specify unknown claims nevertheless covers claims of which the releasor has no more than a mere suspicion. Here it is beyond dispute that appellants had far more than "suspicion" of their present claims when the releases were given. They had been asserting them for a long time.

Appellants concede (see p. 46, *supra*) that at the time they gave the releases (1) they fully knew they had been damaged by certain overt acts of the appellees, (2) they knew exactly what those acts were, (3) they believed that the acts which were causing damage had been performed pursuant to a conspiracy illegal under the Sherman Act.²⁸ The attempt to escape the releases reduces itself to the argument that they believed that the conspiracy had been formed in one year instead of in another. We have seen how spurious the argument is, relative to the statute of limitations. It is even more spurious relative to the releases. No matter when the conspiracy was formed, the damage resulted from the identical overt acts. *F. L. Mendez & Co. v. General Motors Corporation*, 161 F.2d 695, discussed pp. 48-50, *supra*, shows that it is immaterial whether the right to recover for damages arising from certain overt acts is based upon one statute or another or one conspiracy or another. In any event the cause of action is the same.

²⁸In addition to the quotation from the record at p. 46, *supra*, we note that in appellants' brief in the court below, at pages 4 and 33, it is said: "Dr. Suckow knew that plenty of activities were directed against him by the defendants and that plenty was happening to him and his companies as a result of such activities."

Under the *Mendez* case, if appellants had previously sued these appellees alleging the same overt acts and the same damage, but asserting that the conspiracy had been formed in 1927, and if they had recovered judgment and been paid, they would have received full satisfaction for their claim and would not be entitled to recover again by alleging a different year as the time when the conspiracy was first formed. Conversely, had they brought such an action and lost it, that decision would have been *res judicata* and would have barred the second suit.

A fortiori, since they received satisfaction for their "damages" and gave a release therefor, that release conclusively bars them. The very essence of a release is that it acknowledges satisfaction for the damage claimed, and one may not have satisfaction twice (Cf. *Chetwood v. California National Bank*, 113 Cal. 414, 426). We may note, in this connection, that the releases not only covered actions, causes of action, claims, demands, controversies, etc., but also "damages." Since appellants knew at the time they gave the release of the very "damages" for which they now seek to recover, their release unquestionably covered those damages.

In *Momand v. Universal Film Exchanges*, 172 F.2d 37 (1 Cir.) (Dec. 1948), *cert. den.* 336 U.S. 967, plaintiff was held barred, by *res judicata*, from recovering under the Sherman Act for damages resulting from certain overt acts. He complained (p. 47) that

"he was prevented from proving a new conspiracy not previously charged, a conspiracy to destroy the plaintiff's business. This is of a piece with the too generalized character of the plaintiff's proof. * * * But a conspiracy to destroy a business must take specific forms to achieve that end. Attention must be directed to the practices and conduct by which the defendants sought to accomplish their purpose. At no point does the plaintiff present, nor does the record reveal offers of evidence to show that anything beyond the twenty already familiar business practices is involved."

6. THERE IS NO ISSUE OF FACT CONCERNING THE RELEASES. THE SUIT WAS NOT ONE TO SET THEM ASIDE.

Appellants assert (Br. 82) that there are issues of fact. But the only two even suggested (Br. 83) are whether the releases covered "unknown" claims, and whether appellants would have given the releases "had they known of the 1929 conspiracy." We have just seen (pp. 53-57, *supra*), (1) that these questions are irrelevant in law, and (2) in any event, that the claim is sham in fact.

The cases cited by appellants are not in point. In *Raynale v. Yellow Cab Company*, 115 Cal. App. 90, the defendant obtained a general release for \$25 within an hour and a quarter after the accident, plaintiff then still suffering from shock and believing the release to cover damage to her clothing but not the crushing of her hand. In *Jordan v. Guerra*, 23 Cal. 2d 469, plaintiff, a poor cotton picker, in consideration of \$150, gave a release for the death of a child the day after the death, the release being obtained by an insurance adjuster who summoned the plaintiff from the funeral parlor for the purpose before plaintiff could obtain independent advice. One month later the release was rescinded for fraud.²⁹

Moreover, appellants conceded below that this suit is not an action to set aside the releases. Thus counsel said at the oral argument below (R. 648-649):

"There is no attempt to set aside the releases. * * * We do not attempt to set the releases aside in this particular proceeding. This is not an action for that purpose. * * * as I said, we are not attempting to set aside those releases."

²⁹In the other case cited by appellants, *Radio Corporation v. Raytheon Mfg. Co.*, 296 U.S. 459, the question was purely the procedural one of whether, in an action at law wherein the defendant pleaded a release and the plaintiff assailed its validity, the issue of validity was triable at law or in equity; the court expressly confined itself to the one question—the propriety of transferring the case to equity over plaintiff's objection.

Consequently, the releases remain and bar recovery, and all assertions about questions of fact seem pointless.

In the court below, after conceding that no attempt was being made to set aside the releases, appellants asserted that the releases constituted overt acts in the conspiracy. It is difficult to comprehend this contention. We pass an inquiry how appellants' act of giving a release could be an overt act of appellees, but submit that, if any idea at all is meant to be conveyed by the contention, it is that no claim asserted for damages for violation of the antitrust laws, and no antitrust litigation, could ever be settled because the very act of settlement would violate the antitrust laws. The very statement carries its own refutation.

Moreover, an "overt act" is not actionable unless it causes damage. A release of claims does not cause damage but merely acknowledges satisfaction of claims for alleged prior damage.

D. In Fact, No Claim for Relief is Stated Because What Appellants Seek to Do Is to Go Behind Final Judicial Decrees and Judgments.

According to the complaint, the acts of appellees which culminated to the damage of appellants in 1934 did so by resulting in judgments and orders which were rendered in favor of present appellees and against present appellants in actions or proceedings prosecuted or defended by them. Thus the alleged "pressures and activities" engaged in to force the Suckow company to sell and which caused it to lease (Compl. para. 83a, R. 53) consisted of:

1. **Suit of Borax Consolidated, Ltd. v. John K. Suckow, et al., No. C-107-M, filed March 29, 1930 in the U. S. District Court for the Southern District of California (R. 53, 61).** The court there fixed at \$21.89 per ton the value of ore belonging to Borax Consolidated, Ltd. which had been wrongfully taken by its joint tenant John Suckow and the Suckow company. As a consequence of this court order, it is alleged, the Suckow company was

obliged to cease mining (R. 55). From this judgment the Suckows appealed to this Court, but the appeal was thereafter dismissed as a result of compromise of all differences (Compl. para. 83(g)(1), R. 61, 62). The dismissal of the appeal left the judgment in effect as if no appeal had ever been taken (*Wilson v. Aderhold*, 89 F.2d 903), and the judgment and its supporting findings became final (4 C.J.S., p. 2007, para. 1386).

2. Bankruptcy proceedings of the Suckow company alleged to have been instituted by Pacific Coast Borax Company and others associated with it (Compl. para. 83(c), R. 55) in which the Suckow company was adjudged a bankrupt March 2, 1933 (R. 58). The Suckow company appealed the adjudication of bankruptcy to this Court but dismissed its appeal (R. 58).

3. Lease by the Trustee in Bankruptcy of the property to Pacific Coast Borax Company "after court proceedings to such end" (Compl. para. 83(d), R. 59). The order of the Referee authorizing the lease was affirmed by the District Court, and the Suckow company appealed to this Court but dismissed the appeal (Compl. para. 83(e), R. 60). The propriety of the lease was thereby finally adjudicated.

4. Patent infringement suit in which a decree that the defendant Suckow company had infringed was rendered. The Suckow company appealed but dismissed the appeal (Compl. para. 83(b), R. 60, 61).

5. Judgment, in action No. C-107-H, against John Suckow for \$56,601.48. Appeal was taken to this Court but was dismissed (Compl. para. 83(g)(1), R. 61, 62).

6. Proceedings in bankruptcy as a result of which it was determined that a certain rig, claimed by John Suckow, was property of the bankrupt and passed under the lease to Pacific Coast Borax Company. John Suckow petitioned the District Court for review of the Receiver's order but dismissed his petition (Compl. para. 83(g)(4), R. 62, 63), and that determination became final.

7. Judgment against John Suckow for \$50,000 in a suit by the Trustee in Bankruptcy against him. Suckow appealed but dismissed his appeal (Compl. para. 83(g)(5), R. 63).

All these judgments, orders and determinations are final. The damages of which appellants complain were, if they existed at all, the result of these final judgments and orders of the courts, and, are therefore *damnum absque injuria*. Appellants may not go behind the judgments and orders and recover damages from appellees for the simple reason that the very rendition and finality of these judgments and orders is conclusive that they were legally correct, that the Suckows were legally in the wrong in the premises, and that whatever loss the Suckows have sustained from these actions they were subjected to lawfully. The court below could not be asked to relitigate those cases.

Chicago Pneumatic Tool Co. v. Hughes Tool Co., 61 F. Supp. 767 (1945), is directly in point. The defendant there had previously sued the plaintiffs in the United States District Court in Oklahoma for patent infringement, had obtained an injunction, and a Master was appointed to take an accounting; this was affirmed on appeal. Thereafter the defendant in the first case sued its adversary, the plaintiff in the first suit, in the District Court in Delaware alleging violation of the antitrust laws in the use of the patent, relying on recent United States Supreme Court decisions, and sought treble damages. The court sustained "defendant's motions challenging plaintiffs' right to maintain the present action" (p. 772). It held that it could not retry what the Oklahoma courts had adjudicated, and that it could not hold proceedings in the Oklahoma court to be in violation of the antitrust laws when the plaintiffs in that action had prevailed.

Conscious of their lack of a cause of action, appellants here sought to improve their case by alleging (R. 55) that in the action C-107-M the finding that the ore was worth \$21.89 per

ton was obtained "by chicane and false testimony and by other devious means," that the adjudication of bankruptcy was obtained "through false and fraudulent testimony" (R. 58), and that the lease by the trustee to Pacific Coast Borax Company was obtained "by fraud and misrepresentation" (R. 60).

But the law will not permit such allegations to be made, for they constitute a collateral attack on the judgments.

Gerini v. Pacific Employers Insurance Co., 27 C.A.2d 52;

Gale v. Witt, 31 Cal.2d 362 (1948);

Taylor v. Bidwell, 65 Cal. 489;

Fidelity Storage Co. v. Urice, 12 F.2d 143 (affirming dismissal of a complaint on motion on the ground that allegations that a judgment was obtained by false, fraudulent and perjured testimony may not be heard).

The *Gerini* and *Gale* cases contain a full discussion of the rule, but we quote only a brief passage from the *Gerini* case:

"To do so constitutes a collateral attack on the findings, which the law does not permit. * * * For this reason, an action at law for damages against an adversary party for allegedly procuring a judgment by fraud or perjury cannot be maintained while such judgment remains in force. * * * Allegations that defendant procured a patent to land by means of perjured testimony and intimidation of witnesses fails to state a cause of action for a declaration of trust. * * * Complaints proceeding upon the same theory as the present one and containing similar allegations have each been held to involve a collateral attack upon a judgment and therefore not to state a cause of action. * * * We conclude, therefore, that under the authorities cited, the trial court properly sustained the demurrers without leave to amend and entered judgments in favor of the defendants."

No different rules exist because the plaintiffs' charge is a violation of the antitrust laws. The rules of conclusiveness of judgments apply in those cases. *Chicago Pneumatic Tool Co. v. Hughes Tool Co.*, *supra*; *F. L. Mendez & Co. v. General*

Motors Corp., 161 F.2d 695 (7 Cir.); *Momand v. Universal Film Exchanges*, 72 F. Supp. 469 (see p. 473, paras. 5 and 6), affirmed *Momand v. Universal Film Exchanges*, 172 F.2d 37, 44-47 (Dec. 1948).

In *American Banana Company v. United Fruit Co.*, 166 Fed. 261, plaintiff sued for treble damages under the Sherman Act, claiming that Costa Rican officials, "instigated and induced by the defendant," had seized the plaintiff's properties and stopped its operations. The court dismissed the complaint as stating no cause of action, because the acts which caused the damage were the acts of the sovereign—Costa Rica—and because no one can be held liable for procuring a government to act (p. 266). The judgment was affirmed in *American Banana Company v. United Fruit Company*, 213 U.S. 347 (per Mr. Justice Holmes) on the ground:

"The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. * * * It makes the persuasion lawful by its own act."

So here, the damage resulted from court judgments. If one may not go behind the acts of a sovereign performed through its executive, *a fortiori*, he can not go behind the acts of the sovereign performed through its courts.

In *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, the plaintiff sued under the Sherman Act for treble damages because the railroads had, in conspiracy, fixed rates; he was denied damages because the rates had been approved by the Interstate Commerce Commission. The Court (per Mr. Justice Brandeis) agreed that, if the railroads had fixed the rates by agreement and conspiracy, they were subject to criminal prosecution or to an equity suit by the government under the Sherman Act, even though the rates had been approved by the Commission. Nevertheless, the plaintiff could recover no damages

because the rates charged were no greater than the plaintiff was entitled to ask under the Interstate Commerce Act, the decision on that fact by the Interstate Commerce Commission being conclusive. As the Court said:

"Section 7 of the Anti-Trust Act gives a right of action to one who has been 'injured in his business or property.' *Injury implies violation of a legal right.*"

In *Maltz v. Sax, et al.*, 134 F.2d 2 (7 Cir.), cer. den. 319 U.S. 772, this same principle was applied in dismissing a suit for damages from a conspiracy under the antitrust laws.

In the present case the various judgments and orders were the proximate cause of the injury to the Suckows of which they now complain, but those judgments and orders establish their own legality and conclusively establish that appellants here were not injured in a legal right.

II.

DISCUSSION RELATIVE TO EVENTS ALLEGED TO HAVE OCCURRED AFTER 1934 AND ENDING DECEMBER 1942

Just as there may be no recovery relative to the alleged acts occurring prior to the general settlement of 1934, there may be none relative to the alleged subsequent acts, and for similar reasons, (1) statute of limitations, (2) release, and (3) no damage.

A. Recapitulation of the Allegations Concerning the Period After 1934.

The Suckows were out of the borax business entirely after 1934, and any cause of action for being driven out accrued no later than 1934. The only interest thereafter existing was that of the Suckow company as lessor of an undivided half interest in the jointly owned mineral property, leased for a 10-year term to the owner of the other half interest, appellee Pacific Coast Borax Company (see p. 8, supra).

In the eight years between 1934 and 1942, that appellee was on the premises mining the property under the lease. Having

received in the 1934 settlement the equivalent of \$600,000 (see pp. 55, 56, *supra*), appellants again began to assert claims and make accusations.

Consequently, in December 1942, two years before the lease would expire, appellee bought, and the Suckow company sold, its interest and gave another complete release, and the Suckow Company was paid another \$350,000, thus receiving a total of close to \$1,000,000.

The present suit was an attempt to reopen matters for a third time.

As we have seen (p. 9, *supra*), only three overt acts are alleged to have occurred after 1934, (1) cave-ins of the mine, occurring principally in 1937, (2) use of shafts and tunnels, and (3) the sale of the reversion in 1942.³⁰

We now turn to a consideration of these events.

³⁰The only other allegations are that between the latter part of 1939 and December 1942, appellees sought to persuade the Suckow company to agree to a new lease or to sell its reversion, and to this end did the "other things" alleged (para. 88, R. 71). Among these things were (a) a threat to "totally exhaust the said property by mining all the ore for which it had prepaid royalty" under the existing lease (para. 88, R. 71), and (b) the assertion of a right in the lessee not to vacate possession of the premises when the lease expired (para. 88(c), R. 71, 72).

This last group of allegations may be dismissed with a brief comment. Efforts to persuade are not actionable; the specific acts must be appraised. Similarly, mere threats are not actionable, and a cause of action could arise only if the threatened act was done and then only if there was no right to do it. Here, as the complaint shows, the threatened acts were not done since the sale occurred first. Moreover, it would not have been wrongful for the lessee to exhaust the ore "for which it had prepaid royalty," for the simple reason that it had prepaid the royalty and thus owned the ore. So also it would not have been wrongful to remain in possession at the end of the lease, because appellee was the owner of an undivided one half interest in the mine, as well as lessee of the other half interest. It is elementary law in California that each tenant in common is entitled to possession of the property. *Dabney-Johnston Oil Corp. v. Walden*, 4 C.2d 637, 655, 656; *Zaslow v. Kroenert*, 29 C.2d 541, 548. Indeed, the lease itself provided that on its termination the lessee could continue in joint possession of the mine with its co-tenant (R. 340).

B. If Any Claims for Relief Ever Accrued, They Too Have Been Barred by the Statute of Limitations.

The sale of 1942, the very last act alleged in the complaint, occurred nearly 5 years before suit was instituted. Under the principles already discussed (pp. 33, 34, *supra*) any claim on account of it or of any act preceding it is barred by the statute of limitations.

Appellants seek to avoid the effect of the statute by the argument (Br. 61-63) that the running of the statute was tolled until June 30, 1945 by the so-called Moratorium Act of October 10, 1942 as amended in 1945.

Even if that Act had any application to private suits, it still would avail appellants nothing as to the damages resulting from the cave-in, for the cave-in occurred in 1937. By the time of the 1942 sale more than three years had elapsed, and any claim on account of it was already barred by the statute of limitations. Even if the Moratorium Act applied, appellants are barred by the statute of limitations from recovering damages for any overt act occurring prior to December, 1940.

Moreover, the Moratorium Act applied only to proceedings by the government and did not apply to private actions. This subject is fully discussed at pages 17-27 of the brief being filed herein by appellee American Potash & Chemical Corporation. To avoid duplication we adopt that discussion. And we proceed to show that, quite apart from the statute of limitations, there were no claims for relief.

C. Any Claims That May Have Existed Were Released.

We have described the 1942 release at p. 32, *supra*. It released, by name, Pacific Coast Borax Company, Borax Consolidated, Ltd., "their stockholders, directors, officers, agents, servants, employees, attorneys in fact and attorneys at law" (R. 413). And, for the reasons stated on p. 51, *supra*, relative to the 1934 releases, it released every other appellee.

The release was all-comprehensive. In describing the character of matters covered, it used the same language as did the 1934 releases (see pp. 52, 54, supra, and R. 413 and 416), as well as other language which we shall mention.

Patently, the transaction of December 1942 was a complete settlement of all controversies and claims between the parties. Once more the slate between them was wiped clean.

Appellants' brief does not tender any argument that even rises to the dignity of a serious reply on the subject of release. Such arguments as are made we have answered in our discussion of the 1934 releases at pages 52-59, supra. If further demonstration were necessary that the 1942 release wiped out any and all claims, it is furnished by comparing with the release the overt acts alleged to have occurred after the slate had been wiped clean by the releases of 1934. We listed these overt acts on pp. 9, 65, supra, and take them up in the same order.

1. **Cave-ins.** Appellants knew of the cave-ins when they occurred; they made a claim against Pacific Coast Borax Company for the damages resulting and expressly released any claims pertaining thereto. In addition to the all-comprehensive language referred to above, the December 1942 release expressly provides (R. 414):

"Without limiting the generality of the foregoing release, the undersigned does * * * release * * * [the parties already referred to] of and from any and all causes of action, * * * whether or not well founded in fact or in law, for or on account of any injury or damage to the mine in that certain real property described as Parcel 1 in lease of September 17, 1934, * * * and of and from any and all claims * * * growing or claimed to have grown out of or to have been proximately caused **by the caving of the mine** in the said Parcel 1 and of and from any liability for the results or consequences thereof, past or future, * * * together with any and all claims heretofore made or which might have been made on account of anything done, omitted or suffered or alleged to

have been done, omitted or suffered by the lessee with respect to the terms of the said lease * * *, including claims now unknown to the undersigned as well as known claims; and the undersigned does specifically agree that the said Pacific Coast Borax Company, as lessee of said lease, has performed all of the obligations thereof on its part to be performed, * * *"

2. **Use of shafts and tunnels.** Appellants knew of the use of the shafts and tunnels at the time the use occurred, for it is alleged that they protested (R. 71). And the December 1942 release, in addition to its all-comprehensive language, expressly covered (R. 415, 416)

"any and all causes of action, claims and demands, whether or not well founded in fact or in law, for or on account of **the use of the passageways, shaft and other facilities** of the mine in said Parcel 1 of said lease for the transportation and lifting of ore mined in premises of Borax Consolidated, Ltd., adjoining the said Parcel 1 and for any other act of commission or omission in or pertaining to the use or occupation of the said leased premises."

3. **Sale.** Any claims arising from the sale were also released. The release went into escrow together with the deed and bill of sale, i.e., the release, agreements of sale and conveyances were all part of the same transaction. The escrow instructions, which the stockholders ratified and approved (R. 423-425), directed payment to the Suckow company of cash and notes for \$350,000 transmitted by the buyer "provided you [the escrow holder] have received * * * for delivery to buyer through this escrow," a grant deed, a bill of sale (R. 427) and "General release of all claims of seller against buyer and said Borax Consolidated, Ltd., their and each of their officers, agents, servants, employees and representatives" (para. (d), R. 427, 429). The release subsequently delivered to the buyer (R. 413) was identical with the form specified in the escrow instructions (R. 436).

The release extended to all claims which might arise at or before its delivery. It stated (R. 416):

"It is the specific intent and purpose hereof to release and discharge any and all claims, demands and causes of action of any kind or nature whatsoever, whether known or unknown and whether specifically mentioned herein or not, which may exist or which might be claimed to exist at or prior to delivery hereof. * * *."

The deed (R. 418) was delivered on or before December 29, 1942, being recorded in the office of the Recorder of Kern County on that day (R. 421). The release was subsequently delivered by the title company to the buyer, Pacific Coast Borax Company, on January 2, 1943 (R. 421, 422).

Thus the release covered any claims that might have arisen from the sale and conveyance, which were consummated before the delivery of the release.

The complaint alleges (para. 88(e), R. 73) that the sale occurred because by December 1942 the Suckow company was discouraged

*"and due to the past experience of plaintiffs with said defendants and their manner of operating said mining property and their many other persecutions of plaintiffs, and the threats not to surrender the property to said SBM on the expiration of said lease, and due, among other things, to the fact that all of the former customers of said SBM in England and Holland had been taken over by defendants and many of the refineries on the European Continent using raw or calcined ore had discontinued their operations for lack of such ore, and the further fact that all of the former European markets of said SBM had been lost through the activities of defendants, or some of them, said plaintiffs consented that said SBM sell * * *."*

Everything here referred to was, of course, known and in the mind of the Suckow company when it and its stockholders decided in December 1942 to sell and to give the general re-

lease. "Past experience" and "persecutions" referred to in the allegation involved and comprehended all the occurrences prior to 1934 with respect to which appellants had repeatedly charged appellees with conspiracy and violation of the antitrust laws.

D. No Claim for Relief Is Stated.

In this section we confine our discussion largely to a consideration of the claim relative to the 1942 sale of the Suckow company's reversionary interest.

Little need be said of the claim that the lessee made use of the shafts and tunnels upon the property to remove ore from its wholly owned adjoining property. As we have seen (e.g., pp. 6, 24, *supra*, and see discussion, p. 74, *infra*), the Suckow company owned only an undivided one-half interest in the mine, and Pacific Coast Borax Company was not only the lessee of that one-half interest, but it owned the other one-half. Every cotenant in California has equal right to possession and use of the property. *Dabney-Johnston Oil Corp. v. Walden*, 4 C.2d 637, 655, 657; *Zaslow v. Kroenert*, 29 C.2d 541, 545, 548. Consequently, appellee had a legal right to use the shafts and tunnels.³¹

Furthermore, the controversy over the right to the use of the shafts and tunnels was settled, and appellant's claims, if any, were explicitly released (see p. 68, *supra*). Similarly, we shall not discuss the cave-in, for any claim relative to it (1) had already, by 1942, been barred by the statute of limitations, and (2) was also explicitly released. Since appellant has already received full satisfaction for the cave-in and the use of shafts and tunnels, acknowledged by the release explicitly, it may not

³¹Moreover, the right conferred by the antitrust laws on a private party is to recover for injuries to "his business or property" (Title 15, U.S.C. Sec. 15). And use by appellee and lessee of shafts and tunnels as a passageway, at a time when appellant itself was making no use thereof and could not do so (since it had leased its interest), could not conceivably have injured the appellant. Whatever claims appellant may have had as a consequence, they were not claims under the antitrust laws.

recover for them again by the device of alleging that they were committed as part of a conspiracy. As stated in *Momand v. Universal Film Exchanges*, 172 F.2d 37, cer. den. 336 U.S. 967 (May 2, 1949), an antitrust suit wherein plaintiff was held barred from recovery as to certain overt acts (there by reason of *res adjudicata*), "damage from these sources is therefore not open to proof in this case * * *" (p. 42) and see discussion at pages 48, 50, 56, 57, *supra*.

Although claims arising from the sale were also released and, as we submit, barred by the statute of limitations, we may readily show that no cause of action relative to it was alleged.

1. THE GOVERNING LEGAL PRINCIPLES.

No cause of action for private recovery under the antitrust laws is stated unless facts showing damage are affirmatively alleged. It is not enough to allege conduct forbidden by the Sherman Act. A defendant's conduct may subject him to criminal penalties or other proceedings at the hands of the government, but unless damage to a particular plaintiff has resulted from that conduct, the latter has no cause of action. General allegations are insufficient. The complaint must set forth facts from which damages are logically and legally inferable, and it must do so with definiteness. *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 165 (judgment on demurrer); *Turner Glass Corporation v. Hartford Empire Co.*, 173 F.2d 49 (7 Cir.) (March 1949); *Beegle v. Thomson*, 138 F.2d 875, 881 (7 Cir.); *Glenn Coal Company v. Dickinson Fuel Co.*, 72 F.2d 885 (4 Cir.).

These rules have been applied in a number of treble damage suits commenced on the basis of the Supreme Court's affirmance of conviction in *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150. In those cases plaintiff jobbers paid a higher price for gasoline because of the conspiracy, but they did not plead or prove that their margin of profit on resale was lessened by failure to pass the price increases on to the consumer. They

were therefore denied recovery. E.g., summary judgments in *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580 (8 Cir.), cer. den. 326 U.S. 734, and *Leonard v. Socony Vacuum Oil Co.*, 42 F. Supp. 369, 370.³²

Where a buyer of goods or services recovers damages under the antitrust laws, he does so because he has paid more than the "just and fair market price of the goods," and in his complaint he alleges the difference "between the just and fair market price of the goods and the price actually paid," and the "damages claimed are laid at this difference." Cf. *City of Atlanta v. Chattanooga Foundry & Pipe Co.*, 101 Fed. 900, 901. As stated in the opinion of the Supreme Court affirming this decision (203 U.S. 390 at 396), plaintiff recovers because he has paid "more than the worth of the [article]." Or as stated in *Thomsen v. Cayser*, 243 U.S. 66, 88, he alleges "a charge over a reasonable rate and the amount of it." He must allege damages in an amount susceptible of expression in figures. *Keogh v. Chicago & Northwestern Ry. Co.*, supra, at 165. Necessarily, then, if he pays no more than the worth of the goods or services purchased, he may not recover damages regardless of what conduct illegal under the law may be pleaded or even proved. It is so held in *Alden-Rochelle Inc. v. American Society of Composers, Etc.*, 80 F. Supp. 888. There, plaintiffs purchased performing rights under copyrighted material from an illegal monopoly but were denied any damages, the court pointing out that "what they got * * * had some value. * * * Plaintiffs can not recover unless they were led to pay 'more than the worth' of the performing rights." (897)

The converse is, of course, equally true. That is, one who sells rather than buys cannot recover where he receives for what he

³²Also *Northwestern Oil Co. v. Socony Vacuum Oil Co.*, 138 F.2d 967 (7 Cir.), cer. den. 321 U.S. 792 (directed verdict); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747 (8 Cir.), cer. den. 314 U.S. 644 (directed verdict); *Twin Ports Oil Co. v. Pure Oil Co.*, 46 F. Supp. 149, 152.

sells the fair value, and he states no cause of action where he alleges no facts showing that he did not do so.

2. APPLICATION OF THESE RULES TO THE PARTICULAR CASE.

In selling its reversion in a one-half interest in the jointly owned property the Suckow company received \$350,000. It was not alleged that this was not the full or fair value of what was sold, and, on the contrary, what was alleged demonstrated that no such allegation could be made.

Appellants' argument (Br. p. 51) that the trial court made a finding of fact that the price paid was not an inadequate consideration misstates the situation. The point is that the complaint simply tendered no issue on the subject. This was not a case of a complaint merely lacking necessary allegations. Here the affirmative allegations of the complaint showed that there was no damage, and the fact is confirmed by the uncontradicted documents.

The lease provided that the lessee, appellee Pacific Coast Borax Company, had the right to extract the ore during the term of the lease "without maximum limit * * * subject only to payment of the rentals or royalties" specified (R. 66, 67; Lease, R. 339). At the time of the sale the ten-year lease still had nearly two years to go (R. 67; 334).

Appellee Borax Consolidated, Ltd., the parent of the lessee (R. 6), was already half owner of the property, in co-tenancy with the Suckow company (see p. 8, *supra*, and cf. R. 54), the latter owning "but half the ore" (R. 339), and the lease covered only the half interest belonging to the Suckow company (R. 332). Thus the lessee was obligated only to pay royalties for one half of all ore extracted (Compl. R. 67; Lease, R. 339).

Moreover, prior to 1934 the Suckow company had removed over 32,000 tons of ore from this jointly owned property but had failed to account to its co-tenant for any part. This failure was one of the bases of suit No. C-107-H, instituted by the co-tenant, appellee Borax Consolidated, Ltd. (see pp. 7, 59, *supra*), and the claim resulting from the failure to account was

also asserted in the Suckow bankruptcy. As part of the Agreement of General Settlement of August 1934, it was agreed that Borax Consolidated, Ltd. would dismiss its suit against the Suckow company and waive the judgment against John Suckow (for these facts see digest of the complaint and agreement at p. 2 of the appendix to this brief). In consideration thereof, the ten-year lease provided that the lessee could remove a like tonnage of ore without paying any royalty whatever (so alleged in Complaint, R. 66, 67, and see Lease, R. 331, 338).

Furthermore, under the lease the lessee had to pay certain minimum monthly royalties whether or not it extracted ore (R. 342), but such minimum payments made in months of non-operation constituted prepayment on ore subsequently extracted (R. 344).

In 1942 the amount of ore left in the mine and still accessible after the cave-in of 1937 was less than the tonnage which, under the lease, the lessee was entitled to extract without paying any royalty. The complaint so alleges. In paragraph 86 (R. 69) it is alleged that "ore represented by prepaid royalties accrued to said lessee." In the next paragraph (R. 70) the cave-in of 1937 is alleged, and in the very next paragraph (para. 88(a)) (R. 71) it is averred that the lessee threatened that it would

"totally exhaust the said property by mining all the ore for which it had prepaid royalty from the uncaved accessible part of said mine."

If there was any ore in the mine rendered inaccessible by the 1937 cave-in, the damage which the Suckow company sustained by its having been rendered inaccessible was explicitly covered by the release (see p. 67, *supra*), as well as barred by the statute of limitations long before the sale occurred. But so far as accessible ore was concerned, there was none left in the mine except what the lessee already had a right to take without payment, i.e., what appellee owned outright, because it had already bought and paid for it under the 1934 agreement. Such are the

allegations of the complaint, confirmed by the uncontradicted documents.

Behind appellees' rights to remove that accessible ore without payment the appellants may not go, for those rights came from the 1934 lease, and any claim to damage because of the lease was barred by the statute of limitations long before 1942. See *Momand* case, p. 34, *supra*.

Moreover, for still another reason appellants failed to allege a cause of action relative to the sale. The lessor was free to sell or not to sell, as it wished. It was under no compulsion to do so, certainly not at any price it felt was less than fair.³³

In other words, the sale was voluntary. Its reasons for deciding to sell were, so it alleges, that it was "discouraged" (R. 74, and see quotation at p. 69, *supra*). But every overt act of appellees alleged to have contributed to that "discouragement" took place before the 1934 settlement or no later than the 1937 cave-in. For example, as we have seen (pp. 7 and 69, *supra*), it is affirmatively alleged that by the time of the 1934 settlement appellants had been "destroyed financially and left without means or opportunity further to engage in said borax business or any of its activities in any form whatsoever" and that appellants felt that they would not be successful in re-entering the borax business when the lease should expire in 1944 because their former customers and markets had been lost 10 years earlier.

As said in *Momand v. Universal Film Exchange*, 172 F.2d 37, 42, *cer. den.* 336 U.S. 967, if appellants, "without any specific damaging transaction," proceeded voluntarily to make business arrangements which caused damages, "they cannot charge it to

³³For example, appellants allege that appellees first sought to obtain not a sale but an extension of the lease on "more favorable" terms; yet after negotiations continuing "over a period of many months, during which said defendants endeavored in every way possible to force said SBM to the execution of a lease embodying terms of great disadvantage to said SBM," the lessor "refused to enter into any such lease" (R. 73). It was equally free to refuse to sell.

appellees." As for "any specific damaging transactions," any claim therefor had been released and, since they had occurred over 3 years before, had also been barred by the statute of limitations. Even if they had had some adverse effect on the price which appellant was able to receive on sale of its interest in 1942, they still fell within the principles stated in the *Momand* case, that the statute begins to run against each act when it occurs, barring recovery by plaintiff not only of damages for injury immediately suffered but also "for those he will suffer in the future from that particular invasion" (see quotation at p. 34, *supra*).

The sale created no new cause of action.

It is to these obvious truths that the District Court had reference when it pithily said (R. 620, and 81 F. Supp. 301, 305): "In every transaction with the defendants the plaintiffs have received consideration or an adjudication of their rights by a court having jurisdiction."

III.

THE COURT BELOW DID NOT ERR IN REFUSING TO SET ASIDE THE JUDGMENT IN ORDER TO PERMIT APPELLANTS TO AMEND THE COMPLAINT A THIRD TIME.

After appellees' motions were granted and judgment entered (R. 621), appellants moved to "alter or amend the judgment" by vacating the dismissal and granting leave to amend the complaint. That motion in effect was one for a rehearing, since it sought to reopen the case. It was denied (R. 623). Appellant's contention that this was error (Br. 84) has no substance.

In *Laughlin v. Garnett*, 138 F.2d 931 (Ct. App. D.C.), on appeal from an order refusing plaintiff leave to file a third amendment to the complaint, the court held that justice does not require leave to be granted when one has already amended twice. In the present case appellants had already twice amended their complaint, and they had done so after being fully advised in detail of every one of appellees' objections. After the motions had been made and appellees' opening briefs below had been

filed, and on the second day of the oral argument, April 8, 1948, appellants filed a "First Amendment to the Complaint" (R. 80). Subsequently, on April 23, 1948, while the court was awaiting the closing brief, appellants filed and the court received a "Second Amendment to the Complaint"³⁴ (R. 82).

Whether a court, after granting a motion to dismiss, should grant leave to amend rests in its discretion and furnishes no ground for reversal. *Aetna Casualty & Surety Co. v. Abbott*, 130 F.2d 40, 44 (4 Cir.); *Ledbetter v. Farmers Bank & Trust Co.*, 142 F.2d 147, 149 (4 Cir.); *Young v. Garrett*, 159 F.2d 634 (8 Cir.). A refusal to permit amendment did not abuse that discretion in circumstances such as were present here.³⁵

Moreover, when appellants moved to "alter or amend" the judgment, they did not submit to the court any proposed amendment or even disclose the nature of the amendment they proposed to make. This objection was raised in opposition to the motion, both orally and in writing. Yet appellants still made no effort to disclose what they proposed to allege. At no time have they done so, not even now. Failure to disclose the amendments one proposes to make itself requires denial of the motion. *Lilly v. U. S. Lines Co.*, 42 F. Supp. 214; *Schwab v. Nathan*, 8 F.R.D. 227. The rule is one universally applied, as a matter

³⁴In *Rogers v. Girard Trust Co.*, 159 F.2d 239, cited by appellant, plaintiff had never amended and still had a right to do so as of course. In the only other case cited by appellants, *Louisiana Farmers Protective Union v. Great A. & P. Co.*, 131 F.2d 419, the allegations in the original complaint were deemed by the appellate court to be sufficient. The complaint there alleged that defendants had monopolized all the strawberries in the United States and had lowered the price in order to eliminate plaintiff's assignors from business. The trial court refused to believe that these allegations could possibly be true. The appellate court held that the allegations, if true, constituted a cause of action, and that plaintiff had a right to try to prove them (pp. 423, 424). Damage to plaintiff's assignors was alleged, since it was averred that defendants had cut prices below cost and had thereby driven plaintiff's assignors out of business.

³⁵Moreover, in exercising its discretion, the court could fairly take cognizance of the sham character of much of the complaint (see pages 42-45, 38-40, 11-30, supra) and of the sham nature of amendments already made (see p. 47, supra).

of common sense. Cf. *Hook v. Wren*, 44 C.A.2d 441; *Neher v. Kauffman*, 197 Cal. 674, 686; 21 Cal. Jur. 178, 179. A court does not abuse discretion in refusing to allow an amendment which would avail nothing if allowed. *Stephens v. Reed*, 121 F.2d 696 (3 Cir.). *A fortiori*, it does not do so when the proposed amendment is not disclosed.

There was, moreover, no merit or equity in the motion. The judgment of the court was not based on superficialities of pleading or absence of necessary allegations. It was addressed to fundamental objections. No allegation could possibly cure the bar of the statute of limitations. The admitted facts demonstrate that any allegation which appellants might seek to make for that purpose could only be sham. Similarly, all claims have been effectively released in a number of transactions for which appellants have received approximately \$1,000,000. And the absence of a claim for relief is affirmatively shown by positive allegations of the complaint, not merely the result of absence of allegations.

IV.

SPECIAL CONSIDERATIONS PERTAINING TO APPELLEE BANK OF AMERICA AS EXECUTOR OF RASOR'S ESTATE

This appellee was sued in its capacity as executor of Rasor, who died May 21, 1946 (Comp., para. 15, R. 8). It believes the foregoing arguments to be all-sufficient, but, since it acts in a fiduciary capacity, it wishes to note, briefly, a consideration peculiar to it and which it will be unnecessary to review if the court affirms the judgment as to the other appellees, as we submit it should.³⁶

Rasor was otherwise mentioned in the original complaint only twice, as an agent of Pacific Coast Borax Company in 1912 (para. 79, R. 42) and as an employee of United States Borax

³⁶This appellee also filed a motion to dismiss for lack of venue (R. 446). The court below did not pass on this motion, since it dismissed the case for other reasons, and we therefore do not discuss it.

Company in 1918 (para. 79, R. 48). The only charge of complicity in the alleged subsequently formed conspiracy was added by the bare allegation in the "First Amendment to the Complaint," filed during the oral argument, that "within one year subsequent to the formation of the alleged 1929 conspiracy" certain parties, including Rasor "agreed to and became parties to, said agreement" (R. 81). Whether this bare statement can suffice we do not consider, for there is still another defect never cured.

A suit for damages under the antitrust laws being a tort action (see p. 51, *supra*), early decisions held that such suits did not survive either (1) the death of the injured party, or (2) the death of the wrongdoer.³⁷

The true rule of survivability being that tort actions do survive if the estate of the wrongdoer is enriched and that of the injured party is diminished, later cases held that a Sherman Act cause of action will survive the death of *the injured party* since his property or business has been damaged and therefore his estate has been diminished. *Hicks v. Bekins Moving & Storage Co.*, 87 F.2d 583 (9 Cir.); *Moore v. Backus*, 78 F.2d 571 (7 Cir.).

Whether such a cause of action will survive the death of *an alleged wrongdoer* is a different question. In the *Bekins* case this Court cited *United Copper Securities Company v. Amalgamated Copper Co.*, 232 Fed. 574 (C.C.A. 2), wherein it was held (headnote 8) that a Sherman Act cause of action would survive the death of the wrongdoer "in case he secured some benefit at the expense of the plaintiff," and *Moore v. Backus*, *supra*, agrees that the right to recover against the wrongdoer's estate depends, in effect, upon whether the estate had property derived from the wrong which it ought to return (78 F.2d at 575).

The issue here is not the broad question whether a Sherman Act claim may survive, but whether a particular claim survives

³⁷Cf. *Caillouet v. American Sugar Refining Co.*, 250 Fed. 639; *Bonvillain v. American Sugar Refining Co.*, 250 Fed. 641.

the death of a particular party. Rasor was merely a former employee of corporate defendants. As such his assets and his estate were not enriched by the alleged conspiracy. To hold that the estate of a mere employee is liable to suit under the antitrust laws without any allegation of enrichment of the estate would convert a private action for damages into a punitive instead of a remedial proceeding.

No attempt was made to allege any personal benefit to Rasor or enrichment of his estate even though the objection had been pointed out and the complaint thereafter amended relative to Rasor.

CONCLUSION

We respectfully submit that the judgment of the court below was correct and should be affirmed.

Dated: San Francisco, California

July 11, 1949.

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APPENDICES FOLLOW

APPENDIX 1

Digest of the Agreement of August 18, 1934

John Suckow and Ruth Suckow agreed:

1. To cause to be conveyed to Pacific Coast Borax Company or its nominee certain real property in Kern County. Quitclaim deeds thereto were also to be executed by John, Ruth, and the Mojave Borax Company (para. 1 of Agreement, R. 280-282). Moreover, they represented that the property in question was all the borate properties in which any of them had an interest (paras. 2 and 3, R. 282, 283).

2. To an order of the Bankruptcy Court confirming the 5-year lease theretofore made by the trustee to Pacific Coast Borax Company, being the very lease which shortly before they charged was being obtained in violation of the anti-trust laws, and waived all right to review the Referee's order authorizing it. They also agreed to a new 10-year lease (paras. 6(a) and (b), R. 284, 285). They agreed that the Suckow company should consent to the leases (para. 7, R. 287).

3. To give a general release "of any and all claims and causes of action of any kind and nature whatsoever, whether known or unknown, and existing or claimed to exist at or prior to the time of the close of said escrow" (para. 8(a), R. 287, 288).

4. To dismiss the appeal taken by John Suckow from the judgment entered against him in equity action No. C-107-H (para. 8(b), R. 288).

5. To dismiss with prejudice the complaint filed by John Suckow and Mojave Borax Company against Borax Consolidated, Ltd., No. 22868, in Kern County (para. 8(c), R. 288).

6. To dismiss the appeal from the decree adverse to them in the patent infringement suit (para. 8(d), R. 289).

In consideration of the foregoing, Borax Consolidated, Ltd. agreed:

1. To release all claims against John Suckow and the Suckow company arising from wrongful removal of ore from property jointly owned (Agreement, para. 11(a), R. 292). This claim amounted to over \$310,000 (so alleged in complaint, R. 63) and arose from the taking by the Suckow company of over 16,000 long tons of ore (so recited, R. 330). As part of this release Borax Consolidated, Ltd. agreed to dismiss equity action No. C-107-H as against the Suckow company (para. 11(b), R. 293), and it agreed to dismiss its appeal to this Court from certain orders made in the Suckow bankruptcy proceeding which denied it an equitable lien [i.e., a secured and prior position] on the bankrupt's interest in the borate properties (para. 8(e), R. 289; R. 274, 275).

2. To give full satisfaction to John Suckow of the judgment for \$56,601.48 rendered against him in said action C-107-H (para. 11(c), R. 293), and to dismiss with prejudice its action against Ruth Suckow, et al., No. 310-J, which had been brought to set aside fraudulent conveyances made by John Suckow to defeat that judgment (para. 8(h), R. 290).

3. To pay John Suckow and Ruth Suckow the sum of \$150,000 cash (para. 10, R. 292).

4. To release the Suckows of all claims for damages and profits arising from the patent infringement in which an interlocutory decree of infringement had already been entered in favor of Borax Consolidated, Ltd. (para. 11(d), R. 293).

5. To give, together with Pacific Coast Borax Company and United States Borax Company, a general release to John Suckow (para. 11(f), R. 294).

6. To obtain from Gembo, the Dutch firm, release of claim of \$140,000 which Gembo had filed against the Suckow company in the bankruptcy proceeding (para. 11(g), R. 294).

7. To give other considerations.

APPENDIX 2

Appellants' Counteraffidavits Raised No Issue of Fact

Appellants filed three counteraffidavits in opposition to the motion for summary judgment, one of appellant Tobeler (R. 466-520) and two of Mr. Buren, one of their attorneys (R. 570-572, 602-610).

Tobeler's affidavit, while long and with numerous alleged documents attached to it, is incompetent throughout. All of it is on information and belief, i.e., hearsay, and there is not a single document referred to or fact therein alleged to which Tobeler would have been competent to testify of his own knowledge.

As this Court has said in *Piantadosi v. Loew's, Inc.*, 137 F.2d 534, since R.C.P. Rule 56(e) provides that affidavits on a motion for summary judgment, including opposing affidavits, "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein," any part of an affidavit not complying with this rule is disregarded.

Tobeler's affidavit was therefore incompetent, and this objection was promptly made at the hearing (see R. 645, 646, 649, 652, 662-666).

Beyond this, the vast bulk of allegations there made and of alleged documents attached had no relation to any issue bearing on the statute of limitations but constituted an attempt to prove by hearsay the merits of appellants' case, i.e., that there had been a conspiracy. One or two of the attached documents purported to be copies of court records (Cf. R. 642, 643), and, while incompetently offered, appellees agreed that they might be received. These, however, had to do with so-called "denials" by appellees of accusations by appellants, and we have already shown the irrelevance of that material (see pp. 44-45 of the body of this brief).

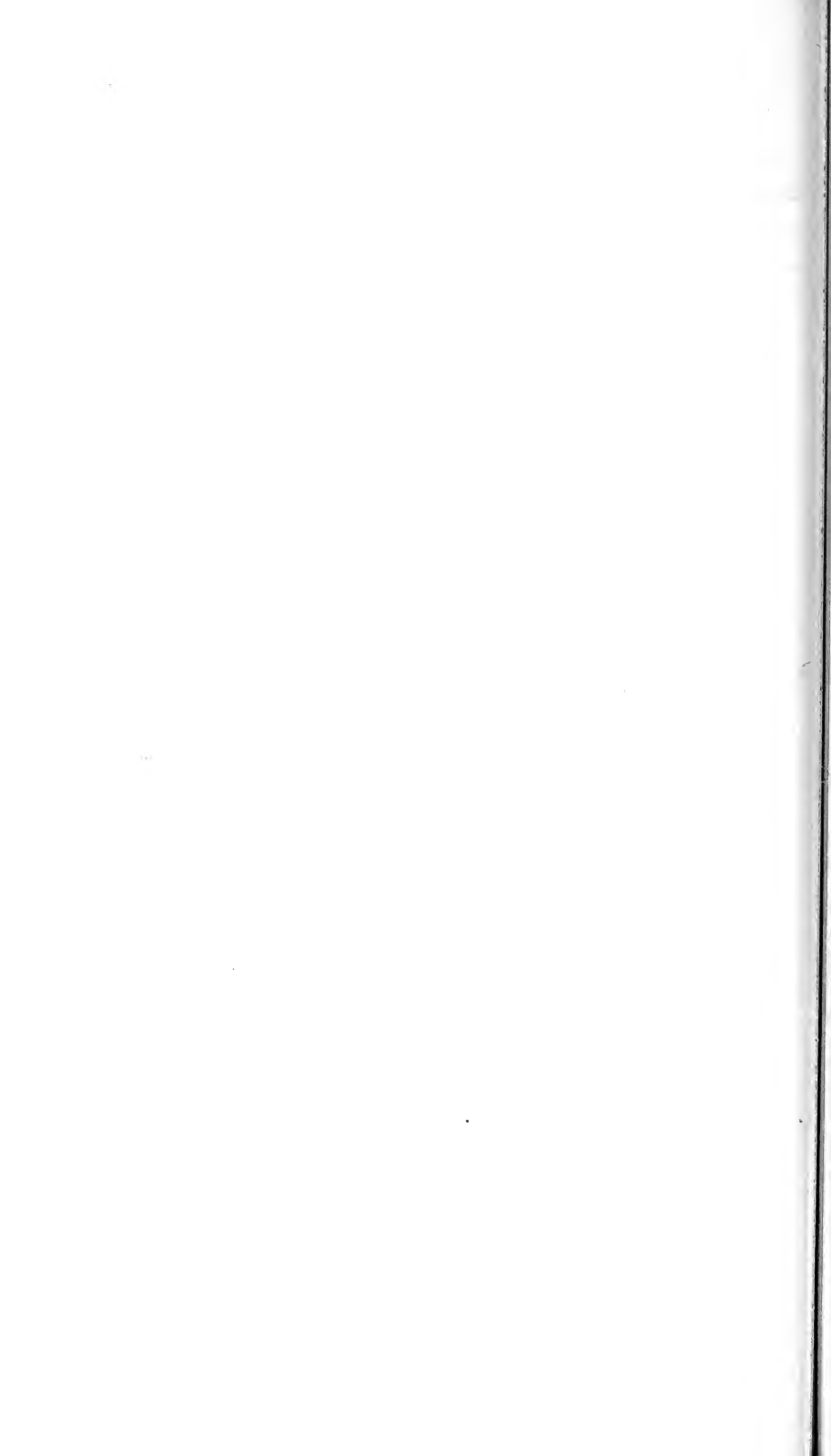
As for Mr. Buren, we have seen (pp. 20-25, 27, 28 of this brief) that during the years in question, acting as the Suckow company's secretary and attorney, he made repeated charges against the appellees of violation of the antitrust laws. The gist of one of his affidavits (R. 602-610) is that he did not know what he was talking about when he made these accusations and did not have sufficient competent evidence upon which the Suckows could have prevailed in a treble damage suit.¹

In the *Burnham* case this Court (170 F.2d 569 at 573 and 574, fn. 4) quoted with approval the statement of the District Court, in granting the motion for summary judgment, that oral testimony by the Burnham company's president "that he had no knowledge or cause to believe, are opinions * * * and not proper evidence" and, further, that, even if it was evidence, nevertheless in view of writings by Burnham over the years making "continuous claim as to the responsibility of the defendants" "no mere lip service to the contrary can rise to the dignity of creating a factual conflict." The law does not permit a man to defer bringing suit until he has the legal evidence to prove his case. If he believes that he has been wronged, he may not defer suit until he has his proof "sewed up." Cf. *Lattin v. Gillette*, 95 Cal. 317. Being convinced or believing that he has a cause of action, he must sue before the statute of limitations has run and then make use of the available discovery procedures, such as taking depositions to require adverse parties to answer under oath and produce documents, demanding inspection of documents, and the like.²

¹Mr. Buren also presumes to say what he believes Suckow or others thought or believed, and he purports to state conversations participated in by Suckow at which affiant was not present.

²To the same effect: *Scafidi v. Western Loan & Building Company*, 72 C.A.2d 550, 570; *Fidelity & Casualty Co. of New York v. Jasper Furniture Co.*, 117 N.E. 258 (Ind.); *Texas Rice Land Co. v. McFaddin etc. Co.*, 265 S.W. 888, 890 (Tex.).

Mr. Buren's other affidavit (R. 570-572) merely quibbles that while the Suckows believed at the time of the accusations that appellees had acted in conspiracy, they believed that the conspiracy had been made at one date instead of at another. At pages 46-49 of the body of this brief we have shown how footless that argument is.



No. 12,158

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation;
MOJAVE BORAX COMPANY, LTD., a corporation;
PAUL O. TOBELER, Executor of the Last Will and Testament
of John K. Suckow, deceased, and RUTH E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX
COMPANY, UNITED STATES BORAX COMPANY,
AMERICAN POTASH & CHEMICAL CORPORATION,
STAUFFER CHEMICAL COMPANY, WEST END CHEMI-
CAL COMPANY, WESTERN BORAX COMPANY, LTD.,
GOLDFIELDS AMERICAN DEVELOPMENT COMPANY,
PACIFIC ALKALI COMPANY, F. LESSER, JAMES M.
GERSTLEY, FRANK M. JENIFER, P. C. BAKER, ALLEN
W. ASHBURN, WALTER A. MOSES, BANK OF AMERICA
NATIONAL TRUST AND SAVINGS ASSOCIATION as
Executor of the Last Will and Testament of Clarence McAnisse
Rasor, deceased, and BEN H. BROWN, as Special Adminis-
trator of the Estate of Victor C. Emden, deceased, *et al.*,

Appellees.

**BRIEF ON BEHALF OF APPELLEE
AMERICAN POTASH & CHEMICAL CORPORATION**

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SUBJECT INDEX

| | PAGE |
|---|------|
| STATEMENT | 1 |
| SUMMARY OF ARGUMENT | 2 |
| I. THE DISTRICT COURT PROPERLY GRANTED THE MOTION TO DISMISS ON THE GROUND THAT THE ACTION WAS BARRED BY THE THREE-YEAR STATUTE OF LIMITATIONS | 4 |
| (a) The Bar of the Statute of Limitations May Be Properly Raised by a Motion to Dismiss | 5 |
| (b) The Complaint Showed on Its Face that the Action Was Barred by the Statute of Lim- itations | 7 |
| (1) The action was barred by the 3-year statute of limitations Section 338(1) of the California Code of Civil Procedure | 7 |
| (2) The allegations in the complaint of fraudulent concealment were not suffi- cient to toll the statute of limitations.. | 8 |
| II. THE DISTRICT COURT DID NOT ERR IN DIS- MISSING THE COMPLAINT UPON THE MOTION FOR SUMMARY JUDGMENT..... | 11 |
| (a) The District Court Properly Ruled that the Affidavits and Pleadings Established There Were No Genuine Issues of Fact to Be Tried | 11 |

| | |
|---|----|
| (b) The District Court Properly Ruled that the Facts Established There Was No Fraudulent Concealment | 14 |
| III. THE MORATORIUM ACT OF OCTOBER 10, 1942 IS NOT APPLICABLE TO SUITS BY PRIVATE PARTIES | 17 |
| IV. APART FROM THE BAR OF THE STATUTE OF LIMITATIONS THE DISTRICT COURT PROPERLY HELD THAT THE COMPLAINT DID NOT SET FORTH A CLAIM UPON WHICH RELIEF COULD BE GRANTED | 28 |
| CONCLUSION | 29 |

TABLE OF AUTHORITIES

Cases Cited

| | PAGE |
|--|------|
| <i>Abram v. San Joaquin Cotton Oil Co.</i> , 46 F. Supp. 969 (D. C. S. D. Cal. 1942) | 6 |
| <i>Baker v. Sisk</i> , 1 F. R. D. 232 (D. Okla. 1938) | 13 |
| <i>Backus v. Look, Inc.</i> , 39 F. Supp. 662 (S. D. N. Y. 1941) | 13 |
| <i>Burnham Chemical Co. v. Borax Consolidated, Ltd. et al.</i> , 170 F. (2d) 569, cert. den. 336 U. S. 924, pet. for rehearing den. No. 513 Oct. Term 1948 2, 3, 8, 10, 13, 14, 17, 18, 28 | |
| <i>Berry v. Chrysler Corp.</i> , 150 F. (2d) 1002 (C. A. 6, 1945) | 5 |
| <i>Carlisle v. Kelly</i> , 72 F. Supp. 326 (E. D. Pa. 1947) ... | 5 |
| <i>Collins v. The Texas Co.</i> , 123 Cal. App. 60 | 9 |
| <i>Consolidated R. & P. Co. v. Scarborough</i> , 216 Cal. 698 | 9 |
| <i>Daily Telegraph Co. v. Long Beach Press Publishing Co.</i> , 133 Cal. App. 140 | 9 |
| <i>Dirk Ter Haar v. Seaboard</i> , 1 F. R. D. 598 (S. D. Cal. N. D. 1940) | 5 |
| <i>Do Brasil S/A v. Stulman-Emrick Lumber Co.</i> , 147 F. (2d) 399 (C. A. 2, 1945) cert. den. 325 U. S. 861 | 12 |
| <i>Downey v. Palmer</i> , 31 F. Supp. 344 (S. D. N. Y. 1939) | 13 |
| <i>Foster & Kleiser v. Special Site Sign Co.</i> , 85 F. (2d) 742 (C. A. 9, 1936) cert. den. 299 U. S. 613 8, 10, 17, 18 | |
| <i>Gossard v. Gossard</i> , 149 F. (2d) 111 (C. A. 10, 1945) | 6 |
| <i>Haley v. Santa Fe Land Improvement Co.</i> , 5 C. A. 2d 415 | 9 |
| <i>Hartford Empire Co. v. Glenshaw Glass Co.</i> , 47 F. Supp. 711 (W. D. Pa. 1942) | 7 |
| <i>Holmberg v. Armbrecht</i> , 327 U. S. 392 (1946) | 3 |

| | |
|--|-----------|
| <i>Johnson v. Ehrgott</i> , 1 Cal. 2d 138..... | 9 |
| <i>Kithcart v. Metropolitan Life Ins. Co.</i> , 150 F. (2d) 997 (C. A. 8, 1945) | 6 |
| <i>Lady Washington Consolidated Co. v. Wood</i> , 113 Cal. 482 | 9 |
| <i>Lindsay v. Leavy</i> , 149 F. (2d) 899 (C. A. 9, 1945) .. | 12 |
| <i>Matson Navigation Co. v. War Damage Corp.</i> , 172 F. (2d) 942, cert. den. June 20, 1949..... | 20 |
| <i>McGrath v. Helena Rubinstein</i> , 29 F. Supp. 822 (S. D. N. Y. 1939)..... | 13 |
| <i>Means v. McFadden Publications, Inc.</i> , 25 F. Supp. 993 (S. D. N. Y. 1939)..... | 13 |
| <i>Momand v. Universal Film Exchange</i> , 172 F. (2d) 37, 49 (C. A. 1, 1949) | 8, 18, 28 |
| <i>Moore v. Boyd</i> , 74 Cal. 167..... | 9 |
| <i>Mutual Life Ins. Co. of N. Y. v. Bullard</i> , 1 F. R. D. 180 (S. D. Fla., 1940) | 13 |
| <i>Myers v. Metropolitan Trust Co.</i> , 22 C. A. 2d 284 | 9 |
| <i>Piantadosi v. Loew's Inc.</i> , 137 F. (2d) 534 (C. A. 9, 1943) | 13 |
| <i>Reeves Steel Constr. Co. v. Weiss</i> , 119 F. (2d) 472 (C. A. 6, 1941) cert. den. 314 U. S. 677..... | 6 |
| <i>Schreffler v. Bowles</i> , 153 F. (2d) 1, (C. A. 10, 1946) cert. den. 328 U. S. 870..... | 12 |
| <i>Shonts v. Hirleman</i> , 28 F. Supp. 478 (S. D. Cal. 1939) | 9 |
| <i>Turman v. Holmes</i> , 29 C. A. 2d 198..... | 9 |
| <i>U. S. v. Carling</i> , 39 F. Supp. 864 (E. D. Wis. 1941) .. | 7 |
| <i>U. S. v. Wittek</i> , No. 473, Oct. Term, 1948, June 14, 1949 (reported 17 U. S. Law Week 4479) | 20 |
| <i>Vertex Investment Co. v. Schwabacher</i> , 57 C. A. 2d 406 | 9 |

| | |
|--|----|
| <i>Wheeler v. Greene</i> , 280 U. S. 49 (1929) | 19 |
| <i>Wilcox Steel Co. v. George A. Fuller Co.</i> , 122 F. (2d) 292 (C. A. 2, 1941) aff'd 316 U. S. 143 | 13 |
| <i>Wilson v. Shores Mueller Co.</i> , 40 F. Supp. 729 (N. D. Iowa 1941) | 7 |
| <i>Wright v. Banker's Service Corp.</i> , 39 F. Supp. 980 (S. D. Cal. 1941) | 7 |
| <i>Wood v. Carpenter</i> , 101 U. S. 135 at 140 (1879) | 9 |

Statutes

| | |
|---|----|
| U. S. Code, Title 15, Section 15 | 1 |
| U. S. Code, Title 15, Section 16 | 17 |
| Act of October 10, 1942, c. 589, 56 Stat. 781 | 19 |
| California Code of Civil Procedure, Sec. 338(1) | 2 |

Miscellaneous

| | |
|---|----|
| Federal Rules of Civil Procedure, Rule 12(b)(6) | 5 |
| Federal Rules of Civil Procedure, Rule 56 | 8 |
| Advisory Committee Report of Proposed Amendments to Rules of Civil Procedure (June 1946) | 11 |
| 2 Moore's Federal Practice (2d Ed.) p. 2244 | 12 |

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SUCKOW BORAX MINES CONSOLIDATED,
INC., *et al.*,

Appellants,

vs.

BORAX CONSOLIDATED LTD., *et al.*,
Appellees.

BRIEF ON BEHALF OF APPELLEE
AMERICAN POTASH & CHEMICAL CORPORATION

Statement

This is an appeal from a judgment dismissing the complaint, entered in the District Court of the United States for the Northern District of California, Southern Division, on November 22, 1948 (R. 621).^{*} The action was brought under Section 4 of the Clayton Act (U. S. C. Title 15 Section 15) for damages alleged to have been sustained by appellants as a result of a conspiracy by appellees in violation of the antitrust laws of the United States. The complaint alleged a conspiracy and overt acts of the defendants, or some of them, in two periods, one prior to 1934, and the other between 1934 and 1942, which caused them damage. This action was not brought until September 11, 1947 (R. 80).

^{*}R—refers to printed Transcript of Record; Br.—refers to Appellants' brief.

Appellees moved to dismiss for failure to state a claim upon which relief could be granted, to dismiss because the action was barred by the three-year California statute of limitations, Section 338(1) of the Code of Civil Procedure, and for a summary judgment supported by affidavits (R. 106-466).

Argument on the motions was heard on April 3, 7 and 13, 1948. On April 7, 1948, appellants filed a First Amendment to the complaint, and on April 23, filed a Second Amendment (R. 82). The District Court determined to withhold a decision until the determination by the Court of *Burnham Chemical Co. v. Borax Consolidated, Ltd. et al.* That decision was rendered on October 27, 1948, 170 F. (2d) 569, certiorari denied March 7, 1949 (336 U. S. 924), petition for rehearing denied April 19, 1949 (No. 513 October Term, 1948). On November 2, 1948 the court below handed down an opinion now reported in 81 F. Supp. 301, and granted appellees' motions to dismiss the complaint (R. 610-621).

Summary of Argument

The principal issues presented by this appeal have already been considered by this Court and disposed of adversely to appellants' contentions in the *Burnham* case. The same counsel who represented Burnham represent appellants and a comparison of appellants' brief with the opinion of this Court in the *Burnham* case shows the same issues and argument are presented with no attempt to distinguish the cases.

Appellants' brief has 87 pages, the first 44 consisting of a description of the nature of the appeal, and over 30 pages

of direct quotations from the complaint. Of the 43 pages of argument, about 20 pages (56-60, 63-79) present the very same arguments which were presented to this Court in the *Burnham* case and which were disposed of adversely to appellants' contentions.

Although the District Court relied upon the *Burnham* decision as dispositive of most of the issues presented by appellants and repeated here, appellants completely ignore this Court's decision. The argument for the application of the equitable rule of *Holmberg v. Armbrrecht*, 327 U. S. 392 (1946) which counsel make in this brief, pages 74-79, was made by the same counsel in the petition for a writ of certiorari in the *Burnham* case, and was rejected by the Supreme Court. This appellee will not re-argue the principles of law decided in the *Burnham* case, but will limit its brief to a discussion of those principles as they are applicable to the issues herein presented.

The issues left for determination by this Court are:

1. Was the motion to dismiss properly granted on the ground that
 - (a) on the face of the complaint it appeared that the causes of action were barred by the applicable three-year California statute of limitations, the last cause of action being alleged to have occurred in December 1942, and the complaint not having been filed until September 11, 1947; or
 - (b) that the complaint failed to state a claim upon which relief may be granted (1) by failing to allege affirmatively any injuries suffered by reason of the appellees' acts, and (2) by affirmatively alleging releases.

2. Was the motion for summary judgment properly granted upon the ground that from the affidavits and pleadings it appeared

- (a) that there was no fraudulent concealment of the alleged cause of action by defendants which would have tolled the statute of limitations;
- (b) that appellants gave appellees releases for which they received adequate consideration, or
- (c) that in every transaction with the appellees, appellants received consideration or an adjudication of their rights by a court having jurisdiction.

If the District Court ruled correctly on any one of these grounds, the judgment should be affirmed.

I.

THE DISTRICT COURT PROPERLY GRANTED THE MOTION TO DISMISS ON THE GROUND THAT THE ACTION WAS BARRED BY THE THREE-YEAR STATUTE OF LIMITATIONS.

Appellants contend the court erred on two counts in granting the motion to dismiss the complaint as barred by the statute of limitations: first, as a matter of procedure, that the issue could not properly be raised on a motion to dismiss; second, as a matter of fact, that the allegations of the complaint were sufficient to establish it was filed timely.

Appellants contend that the statute of limitations may not be raised on a motion to dismiss (Br. 79-82). Appellees raised the issue of the bar of the statute of limitations

both by motions to dismiss and motions for summary judgment (R. 441-466, 617). Affidavits were submitted by appellees in support of the motions (R. 166-440) and by appellants in opposition thereto (R. 466-610).

Rule 12(b)(6) of the Rules of Civil Procedure provides that the defense of "failure to state a claim upon which relief can be granted" may be made by motion. It further provides that if on such a motion the court receives matters outside the pleadings, the motion shall be treated as one for summary judgment.

(a) The Bar of the Statute of Limitations May Be Properly Raised by a Motion to Dismiss.

The defense of the statute of limitations may be made by motion under Rule 12(b)(6) for failure to state a claim where the complaint shows upon its face when the alleged cause of action arose.

The two cases cited by appellants in support of the proposition that under the Federal Rules of Civil Procedure the defense of the statute of limitations may not be raised by motion to dismiss the complaint are *Dirk Ter Haar v. Seaboard*, 1 F. R. D. 598 (S. D. Cal. N. D. 1940) and *Carlisle v. Kelly*, 72 F. Supp. 326 (E. D. Pa. 1947) (Br. 79-80). While these cases apparently support the proposition, both are district court cases and represent a definitely minority view, the overwhelming weight of authority being contrary. Thus, the Sixth, Eighth and Tenth Circuit Courts of Appeal, the only Circuit Courts to rule on the question, have held that the defense of statute of limitations may be raised by motion to dismiss. See

Berry v. Chrysler Corp., 150 F. (2d) 1002
(C. A. 6, 1945);

A. G. Reeves Steel Construction Co. v. Weiss,
119 F. (2d) 472 (C. A. 6, 1941) cert. den.
314 U. S. 677;

*Kithcart v. Metropolitan Life Insurance Com-
pany*, 150 F. (2d) 997 (C. A. 8, 1945);

Gossard v. Gossard, 149 F. (2d) 111 (C. A.
10, 1945).

In *Abram v. San Joaquin Cotton Oil Co.*, 46 F. Supp. 969, the District Court of the United States for the Southern District of California, Central Division, said at page 974:

“The plaintiff questions the propriety of the defendant’s motion to dismiss, to raise the statute of limitations. * * * Rule 9(f) provides: ‘For the purpose of testing the sufficiency of a pleading averments of time and place are material and shall be considered like all other averments of material matter.’ There is a comment on Rule 9(f) in Vol. 1 Moore’s Federal Practice, 595 at 597, viz.: ‘The rule at common law and under the codes has been subject to certain exceptions, that general averments of time and place are immaterial. Subdivision (f) changes that rule in only one respect, viz.: for the purpose of testing the sufficiency of a pleading, i.e., upon a motion to dismiss * * * time and place are material. * * * Since time is material under subdivision (f) for purposes of testing sufficiency of a pleading, a motion to dismiss because the statute of limitations has run may be utilized * * * whenever the time alleged in the statement of claim shows that the cause of action, whether ex contractu or ex delicto has not been brought within the statutory period.’ ”

Other cases supporting this view are

Wilson v. Shores Mueller Co., 40 F. Supp. 729
(N. D. Iowa 1941);

Wright v. Banker's Service Corp., 39 F. Supp.
980 (S. D. Cal. 1941);

United States v. Carling, 39 F. Supp. 864
(E. D. Wis. 1941);

Hartford Empire Co. v. Glenshaw Glass Co.,
47 F. Supp. 711 (W. D. Pa. 1942).

Here the last alleged cause of action was alleged to have occurred in December 1942 (Complaint Para. 88(e) R. 73-75), and the complaint was not filed until September 11, 1947 (R. 80). The applicable California statute of limitations, Section 338, subdivision 1 of the California Code of Civil Procedure, being 3 years, the issue was apparent on the face of the complaint.

(b) The Complaint Showed on Its Face That the Action Was Barred by the Statute of Limitations.

The specific allegations of the complaint showed clearly that the cause of action was barred by the statute of limitations, and the allegations tending to show it was either tolled or suspended were totally insufficient.

(1) The action was barred by the 3-year statute of limitations Section 338(1) of the California Code of Civil Procedure

The activities claimed to have caused the alleged damage fall into two periods, the first culminating in August 1934, at which time appellants went out of the borax business entirely; and the second culminating in December 1942.

Although the complaint was not filed until September 11, 1947, more than three years after the last alleged cause of action, it fails to make any allegation that the statute of limitations was tolled. Failing such an allegation, the action is barred under Section 338(1) of the Code of Civil Procedure.

Burnham v. Borax, supra;

Foster & Kleiser v. Special Site Sign Co.,
85 F. (2d) 742 (C. A. 9, 1936), cert. den.
299 U. S. 613.

See also, *Momand v. Universal Film Exchange*, 172 F. (2d) 37, 49 (C. A. 1, 1949).

- (2) *There were no allegations of fraudulent concealment in the complaint sufficient to toll the statute of limitations.*

On the face of the complaint the action would be barred, unless the allegations of "fraudulent concealment" of the alleged cause of action were sufficient to toll the statute. If the latter allegations were insufficient, the motion to dismiss was the proper procedure. If they were sufficient for purposes of pleading, the issue could then be presented under Rule 56, if it appeared from the affidavits that no material issue of fact was presented. *Burnham v. Borax, supra*.

The complaint contains no allegation that the acts of damage charged were concealed, fraudulently or otherwise, from appellants. The complaint does, however, allege in general terms that appellees "fraudulently concealed" the existence of the conspiracy charged (See paragraphs 89 and 91, R. 75-77). It appears that appellants are contend-

ing that appellees' failure to disclose to them the existence of the conspiracy constitutes, under California law, a "fraudulent concealment" of their cause of action. There is no merit in such a contention for the reason that in any event appellees owed no duty to appellants to disclose to them the existence of the alleged conspiracy.

The complaint alleges no facts which make the theory of fraudulent concealment applicable to these causes of action. The only allegations upon which appellants rely are the *conclusions* (1) that appellees "fraudulently concealed" from appellants their cause of action, and (2) that appellants did not "discover" this fact until the Government instituted suits.

In order to prevent the running of the statute of limitations appellants must *plead* and prove facts establishing fraudulent concealment; the fraudulent concealment must be of facts upon which the existence of the cause of action depends; *facts* must be alleged from which the court may conclude the date of "discovery"; and appellants must allege *facts* which establish that they could not have made the "discovery" earlier by the exercise of ordinary diligence.*

**Vertex Investment Co. v. Schwabacher*, 57 C. A. 2d 406 (hearing by Supreme Court denied); *Lady Washington Consolidated Co. v. Wood*, 113 Cal. 482; *Wood v. Carpenter*, 101 U. S. 135 at 140 (1879); *Collins v. The Texas Company*, 123 Cal. App. 60; *Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698; *Daily Telegraph Co. v. Long Beach Press Publishing Co.*, 133 Cal. App. 140; *Turman v. Holmes*, 29 C. A. 2d 198; *Haley v. Santa Fe Land Improvement Company*, 5 C. A. 2d 415 (judgment reversed with instructions to sustain demurrer); *Moore v. Boyd*, 74 Cal. 167; *Johnson v. Ehr Gott*, 1 Cal. 2d 138; *Myers v. Metropolitan Trust Company*, 22 C. A. 2d 284; *Shonts v. Hirliman*, 28 F. Supp. 478 (S. D. Cal. 1939)

In the *Foster & Kleiser* case, *supra*, the Court stated that nondiscovery, within the meaning of the rule is "absence of facts that would put a party upon notice of the cause of action. Mere ignorance of the injury complained of, or of the facts constituting such injury will not prevent the running of the statute."

The only allegation in the complaint upon which appellants predicate their claim of "discovery" of their causes of action is the commencement of actions by the Government against these appellees on September 14, 1944. Consequently, the only *fact* which appellants have to rely on is that the Government *accused* appellees of violating the anti-trust laws. Appellants allege in paragraph 83e that *in 1934* appellees "claimed they were not in violation of the antitrust laws of the United States" (R. 60). Accordingly, appellants had equally as much cause to investigate the suspicion created in 1934 as they did the suspicion created in 1944. Upon the basis of the allegations in the complaint, appellants should have discovered the cause of action in 1934.

The District Court properly observed

"In none of the cited cases (re fraudulent concealment) is there any rule to the effect that a mere denial of a violation of law constitutes a fraud upon the injured party so that the statute is tolled by reason of the exception to the general rule" (R. 619).

This is in accord with the *Burnham* case where the very same issue was presented.

Each of the acts of damage alleged in the complaint shows that it was known to appellants at the time the act was done. It alleges various acts done jointly by Pacific

Coast Borax Company and Borax Consolidated, Ltd. If appellants were damaged by various acts of appellees jointly from 1934 to 1942, they had just as much cause for suspecting a conspiracy before the Government suits as they did afterwards. Appellants plead no justification for failure to investigate prior to the Government's suits, and do not allege they made any investigation afterwards.

It should be particularly noted that nowhere in the complaint is it expressly alleged that any of the acts charged were done by American Potash & Chemical Corporation.

II.

THE DISTRICT COURT DID NOT ERR IN DISMISSING THE COMPLAINT UPON THE MOTION FOR SUMMARY JUDGMENT.

The District Court found that appellees' contentions were supported both by the allegations on the face of the complaint, and by the uncontroverted facts as they appeared in the affidavits and exhibits, attached thereto. Under the amendment to Rule 12(b)(6) it is immaterial whether the affidavits be treated as accompanying the motion to dismiss or the motion for summary judgment. See *Advisory Committee Report of Proposed Amendments to Rules of Civil Procedure*, (June 1946) 11-15.

(a) The District Court Properly Ruled That the Affidavits and Pleadings Established There Were No Genuine Issues of Fact to Be Tried.

Appellants rely strongly upon the effect of the alleged "admissions" by appellees of allegations of the complaint arising from the filing of the motions to dismiss and for

summary judgment. They take the position that every allegation of fact or law, no matter how general, conclusory, or unsupported, stands admitted (Br. 34, 41-43, 45-48, 60, 69, 73). For the purposes of a motion to dismiss, the well-pleaded material allegations of the complaint are taken as admitted; *but conclusions of law or unwarranted deductions of fact are not admitted*. See 2 *Moore's Federal Practice* (2nd Ed.) p. 2244 Para. 12.08.

Far from *admitting* the allegations of the complaint, the summary judgment procedure is intended to permit a party to *pierce the allegations of fact* in the pleadings and to obtain relief where the facts set forth in the affidavits show there are no *genuine* issues of fact to be tried.

Do Brasil S/A v. Stulman-Emrick Lumber Co.,
147 F. (2d) 399 (C. A. 2, 1945) cert. den.
325 U. S. 861;

Schreffler v. Bowles, 153 F. (2d) 1, (C. A. 10,
1946) cert. den. 328 U. S. 870.

Appellants' contention that affidavits in support of a motion for summary judgment cannot be used to contradict the allegations of the complaint is erroneous (Br. 3, 48-55). The formal issues made by the pleadings are not controlling, the problem being to ascertain from the proof whether a substantial issue of fact remains. If this were not the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss.

Lindsay v. Leavy, 149 F. (2d) 899 (C. A. 9,
1945).

Where it appears from the affidavits and pleadings that there are no genuine issues of fact, and the issues of law

resolve themselves in favor of a defendant, a summary judgment based upon the statute of limitations may be entered on the defendant's motion.

Wilcox Steel Co. v. George A. Fuller Co., 122 F. (2d) 292 (C. A. 2, 1941), aff'd 316 U. S. 143;

Baker v. Sisk, 1 F. R. D. 232 (D. Okla., 1938);

Means v. McFadden Publications, Inc., 25 F. Supp. 993 (S. D. N. Y. 1939);

McGrath v. Helena Rubinstein, 29 F. Supp. 822 (S. D. N. Y. 1939);

Downey v. Palmer, 31 F. Supp. 344 (S. D. N. Y. 1939);

Backus v. Look, Inc., 39 F. Supp. 662 (S. D. N. Y. 1941).

Mere denials by the plaintiff are insufficient to defeat the motion.

Piantadosi v. Loew's, Inc., 137 F. (2d) 534 (C. A. 9, 1943).

Summary judgment should be granted if the court is already convinced from the record that if the action were permitted to go to trial a verdict would necessarily be instructed for the moving party.

Burnham v. Borax, supra;

Mutual Life Ins. Co. of N. Y. v. Bullard, 1 F. R. D. 180 (S. D. Fla., 1940).

(b) The District Court Properly Ruled That the Facts Established There Was No Fraudulent Concealment.

This complaint contains the very same kind of allegations made in the *Burnham* complaint, that there was a "General Conspiracy" of 1929 by which appellees injured appellants, and that this particular conspiracy was fraudulently concealed from them (R. 48-50, 67-69). This Court held in the *Burnham* case that the plaintiff could not rely upon the alleged conspiracy itself as giving rise to a cause of action, but must look to the acts done by the defendants pursuant to the conspiracy, which caused it damage.

The exhibits filed in support of the motions support the conclusion of the District Court that the alleged date of discovery in 1944 was totally unsupported, and that many years prior thereto "the plaintiffs knew, or had reason to believe, that the acts of the defendants which caused the claimed damages were a violation of the Anti-trust Laws" (R. 619).

In the course of lawsuits referred to in the complaint and which appellants alleged were settled appellants made the very same allegations of violations of the antitrust laws against some of these appellees as are made in the present complaint.

In paragraph 80 of the complaint, appellants allege that on or about September 21, 1927, Borax Consolidated, Ltd. commenced an action (No. 20694) against John K. Suckow in the Superior Court, Kern County (R. 50-51). In the District Court appellees filed an affidavit made by John K. Suckow on January 13, 1930 in that Kern County suit, in which he accused the appellees, Borax Consolidated, Ltd., Pacific Coast Borax Company and United States Borax Company, of being a "Borax trust" (R. 85-86).

In paragraphs 13-15, inclusive (R. 93-96), Suckow accused them of an agreement to eliminate competition.

In paragraph 83(b) and (g) of the complaint appellants allege that on March 29, 1930 Borax Consolidated, Ltd. commenced an action numbered C-107-H in the United States District Court in and for the Southern District of California against Suckow Borax Mining Consolidated, Ltd., and that a judgment was entered against Suckow on February 8, 1934 (R. 53, 61). In the District Court appellees submitted as an exhibit the "Answer to Bill in Equity as Amended" which was filed by Suckow in that action on December 8, 1932 (R. 156).

In paragraph two of that answer Suckow made as definite a charge of violation of the anti-trust laws in 1932 as is contained in those paragraphs of the present complaint, which were copied from the Government's complaint filed in 1944. Suckow's 1932 charge was as follows (R. 157-158):

"2. It is and was at all times herein mentioned a part of the fixed design and general policy of said Borax Trust to dominate and control both the extent and amount of production of borate products, and as well the price or prices at which the same should or might be sold in the markets of the world, thereby to secure a monopoly with respect to the production and marketing thereof, wholly for its own gain and to the detriment of its competitors and of the general public. Pursuant to said fixed design and general policy said Borax Trust has at all times herein mentioned established, settled and fixed, and does now by agreement and understanding between its members aforesaid establish, settle and fix, the prices of said borate products from time

to time in such manner as to preclude and to prevent free and unrestricted competition in the production and marketing of the products aforesaid. Said members of said Trust have likewise at all times herein mentioned *combined, confederated, conspired and agreed, and do now combine, confederate, conspire and agree, among themselves, each with the other and in restraint of free trade and competition*, to pool, combine and unite their several interests and facilities in connection with the production, marketing and sale of said borate products in such a manner as to affect, control and dominate the price or prices thereof to the consumer and to the manufacturing world in general, and thereby to stifle competition with regard to such production, marketing and sale thereof.” (italics supplied)

During the course of a hearing in this matter on December 26, 1932, attorneys for Suckow made the following charges in open court (R. 101-102):

“* * * this whole thing is a part of a *plan to throttle competition and create a monopoly* in the United States and subject the people of the United States to the evils of monopoly in the dealings in borax. In other words, that this is a part of the plan to bring about an unlawful and illegal result; and that this court is being used to aid in accomplishing that unlawful purpose * * * If it is true, it constitutes an absolutely illegal proceeding *in direct violation, not only of the policy of the law, but the statutes of the United States.*” (italics supplied)

Many other similar allegations are contained in the record and amply sustain the conclusion of the District Court. The evidence that appellants “knew, or had good cause and reason to believe” that their business was dam-

aged by acts of appellees, which violated the antitrust laws of the United States, is much stronger here than in the *Burnham* and *Foster & Kleiser* cases.

Although appellants filed reply affidavits to those submitted by appellees, their brief does not contain a single reference to or quotation from them in contradiction of the statements made above (Br. 36). They ask this Court to blind itself to the *real facts* by arguing (Br. 69):

“* * * Any references during the intervening years and made by appellants to appellees as violators of the antitrust law are of no moment as against the allegations of the complaint to the effect that appellants had no knowledge of their cause of action (conspiracy of '29) until the time of the institution of the Government actions.”

Since appellants relied entirely upon the unsupported conclusionary allegations of the complaint to contradict *their own prior specific statements* in judicial proceedings and elsewhere, the District Court properly found there was no *genuine issue* of fact to be determined.

III.

THE MORATORIUM ACT OF OCTOBER 10, 1942 IS NOT APPLICABLE TO SUITS BY PRIVATE PARTIES.

Appellants refer to two statutes which they contend suspended the statute of limitations and extended the 3 year period. U. S. C. Title 15, Section 16 suspends the statute of limitations on suits by private persons under the antitrust laws during the pendency of actions by the Government against the same defendants. The complaint does

allege that the Government commenced actions against some of the defendants on September 14, 1944, alleging violations of the antitrust laws, but does not allege how long they were pending. The records of the District Court show that these actions were terminated in 1945 (R. 616). This suspension does not aid appellants, since the last cause of action was alleged to have occurred in December, 1942.

The other suspension statute was the Act of October 10, 1942, a wartime act suspending the statute of limitations in suits by the United States. If it were applicable, claims for relief which accrued prior to December 21, 1940 would still be barred. Since the principal allegations of alleged damage occurred not later than 1934, claims based thereon would be barred in any event, and as to the 1942 transaction, the District Court held no allegations of injuries had been made (R. 619).

Burnham v. Borax, supra;

Foster & Kleiser Co. v. Special Site Sign Co., supra;

Momand v. Universal Film Exchange, supra.

The 1942 moratorium statute does not apply to private party suits but is restricted to suits by the government. This fact is clear (1) from comparing the statute with Title 15 U. S. C. Sec. 16, and (2) from looking at the legislative history of the statute.

Section 16 of Title 15 U. S. C. is part of the original statute which conferred on private parties the right to sue for damages. It provides:

“Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of the

antitrust laws, the running of the statute of limitations in respect to each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

Thus, when Congress intended to suspend the running of the statute of limitations with respect to private suits, it was able to and did use clear language to accomplish that purpose. That clear language may be compared with the language of the moratorium statute (Act of October 10, 1942, c. 589, 56 Stat. 781 (Public Law 740, 77th Congress)), which reads:

"That the running of any existing statute of limitations applicable to violations of the anti-trust laws of the United States, now indictable or subject to civil proceedings under any existing statute, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions which are already barred by the provisions of existing laws."

In *Wheeler v. Greene*, 280 U. S. 49 (1929), Mr. Justice Holmes pointed out that when statutes deal with a similar subject, an omission in the latter one of language in the former is not to be attributable to oversight or to anything but design. "When so important a grant of power contained in the prototype is left out from the copy it is almost impossible to attribute the omission to anything but design, or to believe that it left to very attenuated implications what the model before it so clearly expressed."

And the Supreme Court recently made similar comment in reversing an interpretation of the statute as too broad in *United States v. Wittek*, No. 473, October Term, 1948, June 14, 1949 (reported 17 U. S. Law Week 4479).

In the second place, the legislative history of the moratorium act of 1942 clearly shows that there was no intention on the part of Congress that the act should suspend the running of statutes of limitations applicable to actions by private persons.* The committee reports on S. 2731,** which became enacted into law as Public Law 740, 77th Congress, indicate that the running of the statute of limitations was to be suspended only with respect to civil or criminal proceedings *brought by the United States*.

Thus the Senate and House committee reports, which are identical, state that—

“This committee had previously reported favorably the bill (H. R. 6484), to suspend the running of the statute of limitations applicable to frauds against the United States, which bill has been enacted into law, approved by the President and is Public Law No. 706. *This bill (S. 2731) will accomplish the same purpose as to violations of the anti-trust laws, both civil and criminal.*” (Italics ours).

Public Law No. 706 referred to in the above quotation suspended the running of the statute of limitations with respect to offenses involving the defrauding of the United

*The right to resort to such legislative materials needs no exposition. It is shown, for example, by the recent decisions of the Supreme Court in *United States v. Wittek*, *supra*, and of this Court in *Matson Navigation Company v. War Damage Corporation*, 172 F. 2d 942, *cer. den.* June 20, 1949.

**77th Cong. 2nd Sess., S. Rep't. 1592; H. Rep't. 2480.

States, but was inapplicable to violations of the antitrust laws. S. 2731 was designed to supplement Public Law No. 706 by applying to violations of the antitrust laws,* and the statement of the committees that S. 2731 would “accomplish the same purpose as to violations of the antitrust laws, both civil and criminal” as Public Law No. 706 indicates clearly that S. 2731 was designed to apply only to proceedings brought by the United States *because Public Law No. 706 had no application whatever to actions by private persons.*

The committee reports state that the enactment of S. 2731 was urged by the Secretary of War, the Secretary of the Navy, and the Attorney General, and was approved by the President, and also contain explanatory communications from these persons which indicate that the bill was intended to suspend the running of statutes of limitations only as to civil or criminal proceedings brought by the United States.

Thus a letter of March 20, 1942, from the Attorney General, the Secretary of War and the Secretary of the Navy to the President stated that:

“The undersigned have been considering for some time the problem presented by the fact that some of the pending court investigations, suits and prosecutions under the antitrust statutes *by the Department of Justice*, if continued, will interfere with the production of war materials.” (Italics ours).

*Hearing before a subcommittee of the Committee on the Judiciary, United States Senate, 77th Congress, 2nd Sess., on S. 2431, May 28, 1942, remarks of Attorney General Biddle, at page 12.

The letter went on to suggest a procedure under which the Attorney General, Secretary of War and Secretary of the Navy would examine any investigation, prosecution or suit under the antitrust laws *proposed to be commenced by the Department of Justice* and decide whether it would interfere with war production. If it was decided that such an investigation, prosecution, or suit would interfere with war production, the Attorney General would defer action. The letter then stated—

“The deferment or adjournment of the investigation, suit, or prosecution will not, however, mean the exoneration of the individual or corporation, or the discontinuance of the proceeding. As soon as it appears that it will no longer interfere with war production, *the Attorney General will proceed.*

“To make sure that no one escapes by the running of the statute of limitations, we shall request Congress to pass an appropriate extension of the statute.” (Italics ours.)

The President in a letter of March 20, 1942, notified the Attorney General, the Secretary of War, and the Secretary of the Navy of his approval of the procedure suggested by them and stated

“I note from your memorandum that proper steps will be taken to avoid the running of the statute of limitations * * *.”

The annual report of the Attorney General of the United States for the fiscal year ended June 30, 1943, stated at page 14:

“An arrangement approved by the President and entered into between the Secretary of War,

the Secretary of the Navy, and the Attorney General on March 20, 1942, provides for the postponement of pending and future *federal* court investigations, prosecutions or suits under the Antitrust Laws where it is preponderantly clear that the progress of the war effort would be otherwise impeded. Each postponement is made public and the investigation, suit, or prosecution is to be resumed as soon as it appears that it no longer interferes with war production. *In order to protect the rights of the Government to proceed at a later date* where investigations have been postponed, Congress on October 10, 1942, (56 Stat. 781), provided for the suspension of the operation of any statute of limitations applicable to violations of the Antitrust Laws until June 30, 1945, or until such earlier time as the Congress by concurrent resolution or the President may designate. Under this arrangement, the trials of twenty-four Antitrust cases and two investigations have been postponed during the current fiscal year.” (Italics ours)

On August 18, 1942, the Secretary of War, the Acting Secretary of the Navy and the Acting Attorney General submitted S. 2731 to the Chairman of the Senate Committee on the Judiciary with a letter explaining the necessity for its passage. This letter stated that “in harmony with the purpose announced” in the letter of March 20, 1942, to the President “we request that the enclosed bill be introduced at as early a date as practicable.” The letter then gave the following explanation of the purpose of the bill:

“In instances where anti-trust investigations, prosecutions or suits are postponed, as contemplated by the above-mentioned letter, it is advisable, and

in some instances, essential that the running of the statute of limitations be suspended during the periods of postponement. Such postponements will be during periods expiring not later than the end of the present war. The proposed bill will accomplish the suspension of the running of the statute of limitations applicable to antitrust cases until June 30, 1945, or the earlier date specified therein.

"The undersigned were prepared to submit a similar bill to the Congress prior to the passage of H. R. 6484, which suspends the running of the statute of limitations applicable to frauds against the United States. In view of the fact that H. R. 6484 was then before the Congress, instead of presenting a bill, we requested the amendment of H. R. 6484, so as to provide for the suspension of the statute of limitations applicable not only to cases of fraud against the United States but also to antitrust matters. H. R. 6484 was not however, so amended. *The proposed bill, enclosed herewith, is identical to H. R. 6484, except that, in lieu of providing for suspension of the statute of limitations with respect to frauds against the Government, the proposed bill provides for suspension of the statute of limitations in connection with antitrust suits—a subject matter not covered by H. R. 6482.*" (Italics ours.)

The debate on October 5, 1942 on the floor of the House is also illuminating on the question of the intent of Congress in passing this act.*

"The Clerk called the bill (S. 2731) to suspend until June 30, 1945, the running of the statute of limitations applicable to violations of the anti-trust laws.

*Congressional Record, 77th Congress, 2nd Session, Vol. 88, Part 6, page 7763.

"The Speaker: Is there any objection to the present consideration of the bill?"

"Mr. Rankin of Mississippi: Mr. Speaker, I reserve the right to object. Why should we suspend the law with reference to anti-trust cases at this time?"

"Mr. McLaughlin:* This bill would merely permit the suspension or the postponement of prosecution of anti-trust cases. It would not in any sense suspend the substantive law with respect to anti-trust offenses, *but it would give the Department of Justice a greater length of time in which to prosecute these cases.*

"Mr. Rankin of Mississippi: The trouble is that they have been taking too long now.

"Mr. McLaughlin: This bill is in fact an emergency war measure. It is designed to expedite the war effort. It comes to the Judiciary Committee with a request for its enactment by the Secretary of War, the Secretary of the Navy, The Department of Justice, and by Mr. Thurman Arnold, who is charged with the duty and responsibility of prosecuting antitrust cases. *It is designed to assist the Government.* Under the present situation it may be necessary *for the Government* to lay aside its war activities and engage in the prosecution of an anti-trust case at a time when its energies are needed in war efforts. This bill would permit the Government to continue its war activities and postpone, without prejudice, the prosecution of antitrust cases until such time as such prosecution will not interfere with the Government's war activities" (Italics ours).

*Member of Committee on the Judiciary.

The bill S. 2731 was passed by Congress in the same form as it was submitted to the Senate Committee on the Judiciary by the Secretary of War, Secretary of the Navy, and Attorney General.

It is clear from the extracts from the committee reports set forth above and the debate in the House that Congress never had any intention that the bill should suspend the running of statutes of limitations on actions by private persons. If Congress had intended it to apply to actions by private persons, Congress would have made its intention perfectly clear in the bill. While the Government did cease prosecutions generally, private actions were in no way deterred. Since there was no interference with the right of private persons to commence suits, there was no reason to grant them any additional time.

The report of the Senate Committee on the Judiciary on S. 937* amending Public Law No. 740, 77th Congress, by extending the suspension of the running of the statute from June 30, 1945 to June 30, 1946, indicates that the suspension of the statute was extended for the same reasons that the statute was originally suspended. Thus the report contains a letter dated June 16, 1945, from the Attorney General to the Chairman of the Committee on the Judiciary giving the following explanation for the extension of the suspension—

“In transmitting a draft of the act above mentioned to the Chairman of the Senate Committee on the Judiciary, the Secretary of War, the Secretary of Navy and I pointed out that a procedure has been established under which antitrust investigations,

*79th Cong., 1st Sess., S. Rep't. 422.

prosecutions, or suits would be postponed if it appeared that proceeding therewith would seriously interfere with the war effort. We recommended that the Congress pass an appropriate extension of the statute of limitations applicable to antitrust cases so that postponements under this procedure would not serve to grant immunity to violators of antitrust laws. Inasmuch as the procedure above referred to still is being followed, I feel that it is necessary to continue the suspension of the statute of limitations."

The same report contains a letter dated June 14, 1945, from the Chairman of the Federal Trade Commission to the Chairman of the Senate Committee on the Judiciary.

"The Commission considers important the enactment of the proposed legislation by reason of the fact that *the Federal Trade Commission and the Department of Justice, upon request of the War and Navy Departments, have suspended action in numerous cases* because it was represented that proceedings against various parties would interfere with the war effort" (Italics ours).

The legislative history of the Act of October 10, 1942 clearly indicates that Congress never intended it to suspend the running of the statute of limitations on causes of action by private persons under the antitrust laws, but only intended it to suspend the running of the statute on civil or criminal proceedings by the United States.

IV.

APART FROM THE BAR OF THE STATUTE OF LIMITATIONS THE DISTRICT COURT PROPERLY HELD THAT THE COMPLAINT DID NOT SET FORTH A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

Apart from the bar of the statute of limitations it appears from the face of the complaint that the District Court properly held:

“* * * The instant complaint fails to affirmatively allege any injuries suffered by reason of the defendants’ alleged violations of the Anti-Trust Laws. In every transaction with the defendants, the plaintiffs have received consideration or an adjudication of their rights by a court having jurisdiction” (R. 620).

The theory of appellants was that the “conspiracy” itself was the basis of their cause of action. Upon this ground alone the District Court could properly have dismissed the complaint. *Burnham v. Borax, supra; Momand v. Universal, supra.*

Treating the various events set forth in the complaint as the causes of action, it appears that they consisted principally of agreements and litigation between the plaintiffs and some of the defendants, in all of which there was either an adjudication or settlement of all claims for which plaintiffs received adequate consideration and gave releases. Appellants failed to allege any injuries to their business or property which have not been compensated for through adjudication or settlement. The effect of the settlements and releases is more fully discussed in the brief of Borax Consolidated, Ltd.

Conclusion

The complaint alleged two series of acts, one culminating in 1934, the other in 1942. Under the *Burnham* decision, the statute of limitations had run against all claims unless the causes of action were fraudulently concealed. The District Court properly held that on the face of the complaint the allegations of fraudulent concealment were insufficient, and from the exhibits submitted it appeared as a fact there was no fraudulent concealment.

The complaint failed to affirmatively show injuries to appellants' business or property, but on the contrary it appears that in every transaction with appellees appellants have received consideration or an adjudication of their rights by a court having jurisdiction.

The District Court was justified in granting the motion to dismiss the complaint and for summary judgment on any one of these several grounds.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Dated: July 11, 1949

IN THE
United States
Court of Appeals
For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC.,
a corporation, MOJAVE BORAX COMPANY,
LTD., a corporation; PAUL O. TOBELER,
Executor of the Last Will and Testament
of John K. Suckow, Deceased, and RUTH
E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST
BORAX COMPANY, UNITED STATES BORAX
COMPANY, AMERICAN POTASH & CHEM-
ICAL CORPORATION, STAUFFER CHEMICAL
COMPANY, WEST END CHEMICAL COM-
PANY, et al.,

Appellees.

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SUBJECT INDEX

| | Page |
|---|------|
| Answering the Brief of the Borax Consolidated, Ltd. Group..... | 2 |
| I. The Present Case Is Not Controlled by the Decision of This Court in Burnham Chemical Co. v. Borax Consolidated, as Alleged on Page 2 of the Brief Now Being Answered..... | 2 |
| As to the Statute of Limitations Referred to on Pages 36-38 of Appellees' Brief | 5 |
| As to Subdivision 5, Page 55, Appellees' Brief..... | 6 |
| As to the Claim (P. 59) That the Appellants Seek to Go Behind Final Judicial Decrees and Judgments..... | 6 |
| II. As to the Releases (Appellees' Brief, Page 31)..... | 9 |
| III. As to the Discussion Relative to Events Occuring After 1934 (Appellees' Brief, Page 64)..... | 10 |
| IV. As to the Claim That the Court Below Did Not Err in Refusing to Permit Appellants to Amend..... | 17 |
| V. As to the Contention Re Razor's Estate..... | 18 |
| Conclusion as to Brief of Borax Consolidated, Ltd., et als..... | 19 |
| Reply of Appellants to Brief of Appellee American Potash & Chemical Corporation | 21 |
| As to the Summary of Argument (Pages 2-4)..... | 21 |
| I. As to the Claim That the District Court Properly Held That the Action Was Barred by the Statute of Limitations and That Such Statute Might Be Properly Raised by a Motion to Dismiss | 21 |
| As to the Claim That the Complaint Showed on Its Face That the Action Was Barred by the Statute (Page 7)..... | 23 |
| II. As to the Claim That the District Court Did Not Err in Dismissing the Complaint on the Motion for Summary Judgment (Page 11) | 25 |

| | Page |
|---|------|
| As to the Claim That the District Court Properly Ruled That the Facts Established There Was No Fraudulent Concealment (Page 14)..... | 25 |
| III. As to the Claim That "The Moratorium Act of October 10, 1942 Is Not Applicable to Suits by Private Parties" (Page 17) | 26 |
| 1. No Extended Gloss Is Necessary to Make Clear the Meaning of the Act..... | 27 |
| 2. The Legislative History of the Moratorium Statute Removes All Doubt That It Was Intended to Apply to Private as Well as to Public Suits..... | 31 |
| 3. The Rationale of the Statute Compels the Conclusion That It Was Intended to Arrest All Antitrust Suits, Public and Private, for the Duration of the War..... | 39 |
| Conclusion | 43 |

TABLE OF AUTHORITIES CITED

CASES

| | Pages |
|--|--------|
| Brown v. Elliott, 225 U.S. 392..... | 12, 20 |
| Carlisle v. Kelly, 72 Fed. Supp. 326..... | 22 |
| Collett, ex parte, 69 S.Ct. 944..... | 29, 30 |
| Detsch v. American, Etc., 152 F.(2) 473..... | 25 |
| Eastman v. Yellow Cab Co., 173 Fed.(2) 874..... | 7 |
| Federal Trade Commission v. Cement Institute, 338 U.S. 696, sub- division 4 | 8 |
| Fiswick v. United States, 329 U.S. 211..... | 12, 20 |
| Fleishhacker v. Blum, 109 Fed.(2) 543..... | 5, 24 |
| Frederick Hart & Co. v. Recordgraph Corp., 169 Fed.(2) 580, at p. 583 | 44 |
| Hedderly v. U. S., 193 Fed. at 569—(9th Cir.)..... | 20 |
| Hicks v. Bekins etc., 87 F.2d 583 (9th)..... | 19 |
| Kilpatrick v. Texas, etc., 69 S.Ct. 953..... | 29 |
| Kranshaar v. Lesching, 4 F.R.D. 143..... | 22 |
| Louisiana Farmers, etc. v. Great A. & P., etc., 131 Fed.(2) 419.... | 8 |
| Market v. Swift, 173 F.(2d) 517 [2nd Cir.]..... | 17 |
| National, etc., v. Kelling, etc., 61 Fed. Supp., p. 76, D.C. N.D. Illinois | 14, 15 |
| Nye & Nissen v. United States, 168 F.(2) 846..... | 11, 15 |
| Pashley v. P. G. & E., 25 Cal. (2) 226 at p. 235..... | 24 |
| Rivoli, etc., v. Loew's, etc., 7 F.R.D. 219, on page 222..... | 14, 15 |
| United Copper Sec. Co. v. Amalgamated Copper Co. (2d Cir.) 232 F. 574..... | 19 |
| U. S. ex rel. Marcus v. Hess, 317 U.S. 537..... | 38 |

| | Pages |
|--|--------|
| United States v. National City Lines, 69 S.Ct. 955..... | 29 |
| Vines v. General Outdoor, etc., 171 F.(2) 487 (2d Cir.)..... | 13 |
| Wheeler v. Greene, 280 U.S. 49..... | 29 |
| Wilson v. Seas Shipping Co., 78 Fed. Supp. 464 (Penn.)..... | 22 |
| Yurie v. Thompson, 69 S.Ct. Reporter at page 1018..... | 10, 15 |
| Zimmerman v. Poindexter, 78 Fed. Supp. 420 (Hawaii)..... | 22 |

STATUTES

| | |
|---|--------------------|
| Act of Congress of October 15, 1914, 15 U.S.C. Sec. 12..... | 27 |
| Clayton Act, Section 4..... | 41 |
| Federal Rules of Civil Procedure: | |
| Rule 4(f) | 19 |
| Rule 8(c) | 21, 22, 23, 26, 43 |
| Rule 8(e) | 20 |
| Rule 12(b) | 22 |
| Rule 15(a) | 17 |
| Rule 59, 28 U.S.C.A..... | 17 |
| Rule 73(a) | 17 |
| Sherman Act, Section 7..... | 41 |
| 56 Stat. 781 (1942), as amended, Public Law 107, Act of June 30, 1945, C. 213, 79th Congress, 1st Session..... | 37 |
| U.S.C., Section 15..... | 41 |
| 15 U.S.C.A., Sec. 15..... | 19 |
| 18 U.S.C.A. Sections 80, 82-86..... | 38 |
| 28 U.S.C.A., Sec. 113..... | 19 |
| 31 U.S.C.A. 231-234..... | 38 |

TABLE OF AUTHORITIES CITED

v

Pages

OTHER AUTHORITIES

| | |
|---|--------|
| Hearings Before Subcommittee of the Committee on the Judiciary, United States Senate, S. 2431, May 28, 1942, 77th Congress, 2nd Session, page 29..... | 34, 35 |
| H.R. Rep. No. 2480, 77th Cong. 2nd Session (1942)..... | 37 |
| H.R. Rep. No. 2480, 77th Cong., 2nd Sess. (1942)..... | 32 |
| Sen. Rep. 1592, 77th Cong. 2nd Session (1942)..... | 37 |
| No. 1592, 77th Cong. 2nd Sess. (1942)..... | 32 |
| 10 U.S.L. Week 2621 (March 31, 1942)..... | 32 |



No. 12,158

IN THE

United States Court of Appeals

For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC.,
a corporation, MOJAVE BORAX COMPANY,
LTD., a corporation; PAUL O. TOBELER,
Executor of the Last Will and Testament
of John K. Suckow, Deceased, and RUTH
E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST
BORAX COMPANY, UNITED STATES BORAX
COMPANY, AMERICAN POTASH & CHEM-
ICAL CORPORATION, STAUFFER CHEMICAL
COMPANY, WEST END CHEMICAL COM-
PANY, et al.,

Appellees.

Reply of Appellants to Briefs of Appellees

Two Briefs have been filed by appellees, one by the group headed by the Borax Consolidated, Ltd. and the other by the American Potash & Chemical Corporation. Pursuant to the order of this Court, we shall answer these Briefs separately but include such two answering briefs under one cover.

**ANSWERING THE BRIEF OF THE BORAX
CONSOLIDATED, LTD. GROUP**

I.

**The Present Case Is Not Controlled by the Decision of This Court
in Burnham Chemical Co. v. Borax Consolidated, as Alleged
on Page 2 of the Brief Now Being Answered.**

Throughout their Brief, counsel continually refer to the Burnham case as though the present grew out of an exactly similar situation, which is not the fact.

The Burnham case came to this Court after a trial on the merits so far as the statute of limitations is concerned. Upon the plea of the statute being raised by the defendants in that case, the lower court sent the case to a jury on that question alone, and, after hearing plaintiffs' case, granted the motion for judgment. Pursuant to such order of trial, an answer raising the statute was filed by the defendants, a jury was impaneled and witnesses called and examined and cross-examined, so that when the case reached this Court, it did so in a manner similar to that present in a straight trial on a question of fact.

Here, there was no such trial in the lower court. The complaint here alleges the facts, and to which complaint appellees filed a motion to dismiss and a motion for summary judgment—something utterly different from a trial upon the merits as was the fact in the Burnham case. By so doing appellees admitted all of the allegations of the complaint well pleaded (Appellant's Opening Brief, pages 3 and 48). Here, counsel constantly refer to questions of fact presented by their affidavits in support of their motion for summary judgment, exactly as though this case had also gone to a jury, and a large part of their Brief is directed to a discussion of such facts exactly as though a judgment on the merits had been rendered by the lower court and such judgment attacked on the ground that it was not supported by the evidence. The

purpose of counsel in so proceeding is evident, namely, to attempt to escape the admission of the allegations of the complaint which they are compelled to make in the face of their motion to dismiss and for summary judgment.

Once determined that the complaint herein states a cause of action, all of the contentions made by appellees on pages 4 to 30 inclusive of their briefs fall, for by their motions they admit themselves out of court. Furthermore, affidavits filed in support of a motion to dismiss or for summary judgment cannot be used to contradict the allegations of the complaint. (Also, see page 48, our Opening Brief.)

Different situations and different rules of law are presented herein from those arising in the *Burnham* case. It makes no difference whether or not the facts alleged in the affidavits as filed remain uncontradicted by the other party to the litigation, for contradicted or uncontradicted, they form no defense as against the allegations of the complaint. Appellees' admissions of such allegations stand controlling as against them, and they cannot escape by a welter of words and charges in affidavits. They are entangled in the meshes of their admissions and their only hope of escape is by pleading to the merits and a trial thereon.

Appellees attempt, through their affidavits, to try the merits of the cause on these motions and without the right of appellants to cross-examine the witnesses presenting the facts alleged in such affidavits. Even the documentary evidence referred to in such affidavits would be susceptible to examination and criticism and the court would be required to pass upon the facts raised by the complaint and the attempted denials or avoidance set forth in the affidavits. The attempt and purpose is to deny the allegations of the complaint by these affidavits—in some places by direct denials of such allegations and in others as a confession and avoidance of the alleged facts. This cannot be done and such procedure is wholly improper. The lower court fell into the trap set by appellees and directly passed upon many

of the questions of fact tendered through such affidavits. Permit us again to refer to our Opening Brief, pages 48 et seq., in which we set forth the law on this question and illustrate various instances where the lower courts did find upon the facts in violation of the law only to be reversed on appeal. In such subdivision we also point out to this court various questions of fact which are raised by such affidavits.

Appellees contend that in certain respects the documents attached to the affidavits show conclusively that the facts alleged in the complaint are incorrect, but no matter how apparent such situations may be to appellees the allegations of the affidavits are directly contrary to those of the complaint and on such motions as are here present, the court cannot accept as unquestionably true the statement set forth in such affidavits. The cases all hold, as shown in our Opening (p. 48) that an affidavit cannot be treated as proof contradictory to well pleaded facts in the complaint. Therefore, no matter how strong the allegations of fact may be in the affidavits they cannot, in the face of the allegations of the complaint, constitute the basis of a dismissal of such complaint. The cases cited in our Opening all illustrate the right of a plaintiff to prove his case in an orderly and proper manner and by the introduction of witnesses on his behalf and the cross-examination of those presented by the defendant so that his rights in his case may be thoroughly explored before the trial court. It will be noted that nowhere in the Brief of appellees do counsel question the rule that on a motion to dismiss or for summary judgment, all of the allegations of the complaint, well pleaded, are admitted. Nor do they contest the further rule that an affidavit cannot be treated as contradictory proof to the allegations in the complaint. On page 41 counsel again refer to the *Burnham* case and contend that the court will affirm a summary judgment despite allegations in the complaint; in such case, however, the statements referred to, both on pages 37 and 41 of appellees' Brief, overlook the fact that the facts referred to in the *Burnham* case were determined *upon a trial* in the lower court, and that such facts so

referred to by this court in its opinion (172 Fed.(2) 578) were such facts determined upon a trial. Here, there has been no trial—merely a motion and the mere say-so of counsel or defendants as to what the facts are does not rise to the dignity of a determination upon trial. To the contrary, such facts are admitted by appellees.

**As to the Statute of Limitations Referred to
on Pages 36-38 of Appellees' Brief**

Of course, if the complaint alleges, without explanation, facts which show the cause in suit is unquestionably barred by the statute—a motion to dismiss may possibly reach such question, if the Statute of Limitations can be advanced on such motions (see later). But where, as here, the delay in bringing suit is tolled by the fraud and concealment of defendants, the California rule in reference thereto becomes operative whereupon there enters into the general factual situation presented, the question of whether or not fraud and concealment did exist and when the cause of action was actually discovered by the plaintiff. Such is also the rule of this court, as announced in the case of *Fleishhacker v. Blum*, 109 Fed.(2) 543, and cited on pages 69 and 70 of appellants' Opening and wherein it is held that the word "discovery" means "actual knowledge," or knowledge of facts which, in the exercise of due diligence, would have led to an actual discovery of the fraud—all of which are questions of fact. The cases cited on pages 69 to 73 inclusively of appellants' Opening are again respectfully referred to as demonstrating the questions of fact which are here presented by the allegations of the complaint and attempted to be overcome by the affidavits of appellees.

Counsel continuously endeavor to give the impression that the facts of the *Burnham* case and the present case, are on all fours but the reading of the complaints in the two cases will show that aside from the general allegations as to the historical features and the conspiracy and general fraud of defendants,

the facts of the two cases so far as wrongs suffered by the respective plaintiffs, are entirely different so that the references to the *Burnham* case and to some of the statements of this court as to the facts of such case cannot be applied as controlling in the present case.

As to Subdivision 5, Page 55, Appellees' Brief

Herein appellees claim that appellants received \$600,000.00 under such release and set forth in appendix I a summary of the 1934 agreement. Such amount is entirely erroneous and the amount mentioned is grossly excessive. They make no mention, however, of the fact that the property conveyed to appellees, pursuant to the 1934 agreement, contained borax of the value of many millions of dollars and that none of such property would have been conveyed had appellants been aware of the formation of the 1929 conspiracy. These allegations are likewise admitted by appellees so that all that appears in such subdivision 5, as well as subdivision 6 immediately following, are mere discussions of the releases not permitted to be advanced on this hearing.

As to the Claim (P. 59) That the Appellants Seek to Go Behind Final Judicial Decrees and Judgments

Here again appellees attempt to raise and discuss questions of fact on these motions. The allegations of the complaint with reference to the multiple litigation in which appellees embroiled appellants constitute statements of overt acts performed pursuant to the conspiracy of 1929 and are all admitted by appellees to be such upon this motion. Therefore, no discussion of such litigation is proper at this time and so all of that portion of appellees' Brief, between pages 59 and 64, inclusive, has no place on this appeal. The complaint sets forth the facts concerning each of the seven proceedings referred to and designates them as overt acts. Appeals from the majority of the judgments entered in the lower courts were pending at the time of the making of the settlement of 1934. The fact that such agree-

ment provided for the entry of final judgments in such proceedings is immaterial for such steps formed a part of such settlement agreement and did not alter the original standing of such proceedings or of such settlement agreement as overt acts. What loss or damage was suffered by appellants through the entry of final judgments stands exactly the same as loss or damage suffered through any other overt acts; in this treble damage action appellants are not endeavoring to recover damages or relief through any of such actions referred to but by reason of their being overt acts in the conspiracy.

On page 61 counsel claimed that all of the judgments referred to are final, endeavoring to convey the idea that they became such as a result of legal determination of the controversies presented. That, of course, is not correct for such finality as such judgments possess, came as a result of the settlement of the controversies involved in the making of the 1934 agreement. They were all by stipulation and not by final court determination so do not possess the character sought to be given them by counsel.

The contention made on page 62 that the allegations of the complaint constitute a collateral attack upon the various judgments referred to is not correct, for in the complaint there is no attack, as such, upon any such judgment but instead a statement that all of such acts and proceedings and the activities of appellees pursuant thereto constituted overt acts performed pursuant to the conspiracy—all admitted by appellees on this appeal.

That the complaint herein states a cause of action is shown conclusively on pages 45 to 47, inclusive, in appellants' Opening Brief. In addition to the authorities there cited, please see the recent case of *Eastman v. Yellow Cab Co.*, 173 Fed.(2) 874, wherein it was stated on page 880 as follows:

"Construing the complaint in the light most favorable to plaintiffs, we hold that it does state a claim under the Sherman Act upon which relief can be granted. *It is of course no valid objection that all of the relief asked for in the complaint and the amendments thereto cannot be granted.*"

See *Federal Trade Commission v. Cement Institute*, 338 U.S. 696, subdivision 4, where the *Stevens* case cited by appellants on page 46 is affirmed on the point that the complaint states a cause of action.

In further support of the rule laid down in the *Stevens* case (p. 46, Appellants' Opening Brief) as to the sufficiency of the allegations of the complaint, we ask permission to refer to *Louisiana Farmers, etc. v. Great A. & P., etc.*, 131 Fed.(2) 419, where it is held that a plaintiff is entitled to an opportunity to *attempt* to establish allegations of its complaint regardless of how improbable it may be that plaintiff can do so. This authority is also presented in our Opening in support of the contention that the lower court erred in refusing to allow appellants to amend.

On page 16 of appellees' Brief, counsel in an attempt to bolster one of their affidavits, call attention to the fact that in an answer filed by certain of the appellants in the proceedings at Los Angeles, it was alleged that appellants were informed and believed that on or about September, 1927 a certain conspiracy was formed by the appellees. Such attempt, however, is of no moment, for, in addition to the fact that such affidavits filed by appellees are not controlling in this proceeding as against their admissions of the allegations of the complaint, such allegation of appellants refers to a conspiracy of September, 1927, while in the present action appellants refer to and base their cause of action upon a conspiracy formed by appellees in 1929—the General Conspiracy referred to throughout the complaint (see p. 9 of appellants' Opening). Two different conspiracies and wrongs are referred to. Therefore, from a mere factual standpoint the conspiracy existing in 1927 is not the conspiracy complained of herein, namely, that of 1929.

As to the Releases (Appellees' Brief, Page 31)

Appellants contended in their Opening Brief, page 82, et seq., that the question of the two releases urged by appellees on their motion to dismiss and for summary judgment, could not be brought to the attention of the Court on this particular proceeding, and could only be advanced as an affirmative defense, according to the direct provision of Rule 8(c) and the authorities cited by appellants. *Such rule is controlling in this particular proceeding and prevents the urging by appellees herein of such releases*—but in spite thereof, appellees have elected to ignore totally this Rule and the authorities cited and proceed to set forth various arguments concerning the facts of such releases, all of which, by the provision of Rule 8, must be ignored as having no place on a motion to dismiss or for summary judgment. Why the lower court elected to overlook Rule 8 and the authorities cited by appellants and to find directly on questions of fact involving such releases, is to us of course unknown, but the fact that the lower court did so act and did pass upon the facts is demonstrated by the order of such lower court, as shown on pages 82, et seq., of our Opening. Appellees totally ignore Rule 8 and then proceed, on pages 31 to 58, inclusive, to discuss the *facts* surrounding such releases, and in doing so attempt again to drag in the Opinion in the *Burnham* case, which, in view of the fact that there were no releases in such case, is entirely inapplicable.

On those pages devoted to the facts of the releases, appellees state themselves again out of court, even though it were possible to raise the question of such releases on these motions. They admit all the allegations of the complaint concerning such releases and the reasons that they were given by appellants, and then attempt to deny their own admissions by their affidavits. Subdivision C of Rule 8 provides in part as follows:

"In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and

award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, *release*, *res judicata*, statute of frauds, *statute of limitations*, waiver, and any other matter constituting an avoidance or affirmative defense * * *."

In the light of such Rule all of the pages of appellees' Brief relating to these releases become but a tale "full of sound and fury, Signifying nothing."

III.

As to the Discussion Relative to Events Occurring After 1934 (Appellees' Brief, Page 64)

All of the points raised under this particular subdivision involve a discussion of facts—none of which can be properly presented on this appeal. On page 65, counsel claim that from 1934 to the last settlement in December 1942 only three overt acts occurred. This is not correct for as the complaint shows there was constant activity on the part of appellees subsequent to 1934, with the studied purpose and intent of eliminating the appellants. Just when this series of continuous acts began and when they separately ended is of course impossible of ascertainment, but the continuity of the same is apparent from the allegations of the complaint and even from the mouths of the appellees as expressed through their affidavits and motions. Again, counsel refer to \$350,000.00 as received by appellants on the first settlement; that is an incorrect statement of fact for the actual payment was \$150,000.00. The true facts are that the properties turned over to appellees by the two settlements of '34 and '42 were of great value, far exceeding the amounts received by appellants and extending to several millions of dollars. The continuous activities of appellees subsequent to '34 are similar to the facts appearing in the recent case of *Yurie v. Thompson*, decided by the Supreme Court on May 31, 1949 and appearing in 69 S.Ct. Reporter at page 1018. That case

involved a determination of when the statute of limitations began in a situation involving an occupational disease. The plaintiff alleged that he was a victim of silicosis and sued by reason of the damage resulting to him. The defendant plead the statute and the question of when the statute arose became pertinent. The Supreme Court held that the injured employee could be considered "injured" only when the accumulated effects of the dilatory substances manifested themselves. That is parallel in all respects to the present situation. Here the machinations and activities of the appellees continued right after the execution of the '34 agreement by which they put appellants out of business as to certain borax properties and activity on their part and immediately with the wicked thought in mind created by the conspiracy of '29 commenced their constant pressure and acts, all designed to the ultimate removal of appellants from all borax activities and as competitors of appellees. It would be impossible to determine and subsequently allege each act of appellees as an overt act for they were interwoven and continuous; the only comparison would be the steady development of damage once the trade disease commenced in the *Yurie* case. The accumulated efforts of such activities of appellees did not finally come to a head until December 1942 when appellees succeeded in eliminating appellants from the competitive field. We respectfully request close attention to the *Yurie* case for we believe it most pertinent to the facts of the present litigation. It is the best illustration of what really happens in one of these treble damage cases when the defendants cannot eliminate their competitors in one full swoop but must accomplish their results over a long period of time through constant pressure. Another illustration of such a situation is expressed in a case from this Circuit, namely, *Nye & Nissen v. United States*, 168 F.(2) 846. Certiorari was granted but, as we are informed, the case was affirmed. There the complaint details a description of the means by which the conspirators *planned* to impede the Government's inspection

functions. The *planning* of the wrongdoing was held sufficient to constitute a cause of action, just as here the *planning* of the appellees for the destruction of appellants is the same character of wrongdoing held to be sufficient in the *Nye* case. Twice the Supreme Court has held that the statute runs from the last overt act during the existence of the conspiracy. Once in *Fiswick v. United States*, 329 U.S. 211, and earlier in the leading case of *Brown v. Elliott*, 225 U.S. 392, and cited in Point III of Appellants' Opening Brief at pages 59 and 60. The last overt act in the period from '34 to '42 was the making of the settlement agreement of '42, and therefore the statute did not begin to run according to the cited authorities until the completion of such last overt act.

In Subdivisions (c) and (d) of such Point II, counsel again resort to the 1942 release in an endeavor to escape liability. They never seem to give up hope that such release cloaks them against liability and in such desire forget and pass over entirely the provisions of Rule 8 heretofore set forth. Counsel have argued with great vehemence the effect of the 1942 release and set forth in R. pages 413 et seq. We contend that this very release shows on its face the fraud and concealment practiced and intended to be practiced by the British appellees upon the appellants herein. The release is in general form but *makes no reference of any kind whatsoever to any claims growing out of violations of the antitrust laws.*" Counsel claim that what the appellees were trying to do was to buy their peace; they knew at that time of the general claims made by appellants that appellees were violators of the antitrust law under a conspiracy of 1927 (not of 1929), and yet made no specific reference to any such claims in the releases in question. They refrained from including any mention thereof in the releases, evidently for fear of calling such claims to the attention of appellants. Appellees also knew of the formation of the '29 conspiracy and that appellants were ignorant thereof. The fact that no mention thereof was made in the releases shows conclusively the

desire and intent on the part of such appellees to conceal and attempt to cover specific unnamed violations by a general release. This certainly was an attempt to buy peace by chicane—evasion of the real issue. Likewise, in the '42 release specific reference is made to damages resulting from the operations of the mines by appellee Pacific Coast Borax Company and the releases of other specific claims in connection therewith are included, but no specific release from any antitrust charges which appellants might have made against such appellees. Such an omission clearly shows concealment; appellees endeavored to cover by their general and very broad recital of "claims known or unknown, valid or invalid," and by other like phrases, the charges of violations of the antitrust laws made by certain of the appellants against them. Had such appellees been acting honestly they would have set forth specifically in the releases such character of claims.

The 1942 release is similar to that presented in *Vines v. General Outdoor, etc.*, 171 F.(2) 487 (2d Cir.). There the court held (Subdv. (12)) as follows:

"Advertising solicitor's release of all claims of any kind against employer, particularly claims for salary, commissions, or compensation under employment contract, did not inevitably release claim of which solicitor was then ignorant based on employer's withdrawal of one of solicitor's accounts pursuant to agreement in violation of Anti-Trust Acts. Clayton Act, Sec. 4, 15 U.S.C.A. Sec. 15."

By the above discussion as to the facts of the release, we do not intend to waive our contention that any consideration of the releases is improper due to the provisions of Rule 8.

In subdivision (1) on page 71 counsel enter into a discussion of the allegations as to damage in the present case and makes the general claim that unless damages are alleged specifically the complaint does not state a cause of action. Among such claims of counsel is the following: "General allegations are insufficient" and that the complaint must set forth facts from

which damages are logically and legally inferable and must do so with definiteness." Such is not the rule in treble damage cases. See *National, etc., v. Kelling, etc.*, 61 Fed. Supp., p. 76, D.C. N.D. Illinois, where it was held: (Subdv. (18))—

"General allegation of damages, in action for violation of anti-trust laws was sufficient as against motion for bill of particulars, since element of damage was a matter of proof on the trial and could be best determined by interrogatories, or by depositions. Sherman Anti-Trust Act Sections 1-8, 15 U.S.C.A. Sections 1-7, 15 note; Clayton Act Sec. 3, 15 U.S.C.A. Sec. 14."

Also in *Rivoli, etc., v. Loew's, etc.*, 7 F.R.D. 219, on page 222 the court said:

"* * * If the conspiracy to monopolize is sufficiently charged, the law is met by a general statement of damages by reason thereof. *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Ass'n*, 3 Cir., 152 F. 864, 10 L.R.A. N.S., 972. Directly applicable is the language of the Supreme Court in *C. E. Stevens Co. v. Foster & Kleiser Co.*, 311 U.S. 255, 61 S.Ct. 210, 213, 85 L.Ed. 173, that: 'The conspiracy, with its effect on interstate commerce, is alleged to have caused the petitioner great expense and loss of profits; to have restrained and prevented * * * "all to the great injury and damage of the plaintiff." * * * While these allegations are general, we cannot say that they are inadequate * * *.'"

Practically the same allegations are present in the instant case as those in the *Rivoli* case, as well as in the *Stevens* case cited and quoted in the *Rivoli* case.

Counsel contend in this subdivision that the complaint must set forth facts from which damages are logically and legally inferable, and that it must do so with definiteness, citing such cases as *Keogh v. Chicago, etc.* Such references are not pertinent here especially in the face of the definite allegations in the complaint of the overt acts alleged, all of which are claimed to have caused damages. The purpose of appellants in setting forth so fully in their Opening Brief the allegations of the

complaint was to demonstrate the actual statement therein of the activities of appellees. See page 4, Opening Brief, paragraph 64, wherein the purposes of the conspiracy are set forth in full, showing the *planning and intent* of appellees and bringing this case under the rule announced in *Nye & Nison v. United States* and *Yurie v. Thompson, supra*. Thereafter, in our Opening Brief follows a specific statement of the allegations of the complaint and of the activities of appellees and on pages 19 et seq., are set forth the overt acts performed and carried out by the appellees pursuant to the conspiracy. We call particular attention to this portion of the complaint for here is set forth in detail the specific allegations of the wrongs performed; to subdivision C on page 21 wherein is related the history of the bankruptcy proceeding and the charges that such was commenced and brought about through the fraud of appellees or some of them. Nothing could be more definite than the charges made in such paragraph 83 of the complaint; such allegations form the basis of the charges of paragraph 84 appearing on page 26 of our Opening, wherein it is alleged that due to such bankruptcy proceeding and to each and every activity of appellees referred to in the preceding paragraph, *the appellants herein were destroyed financially* and were left without means or opportunity to further engage in the borax business or its activities. Therein is a specific and definite statement that damages resulted to appellees from the performance of the overt acts set forth in the preceding paragraph. The subsequent portions of the complaint, as set forth in our Opening Brief, describe in particular all that is required in such a treble damage action as the present, according to the authorities. In addition, appellants set forth on pages 40 et seq., of their Opening, "The Admissions of Appellees," among which is the statement that due to the activities of appellees appellants were damaged in the sum of \$5,000,000.00. Under the rule in anti-trust cases such an allegation as to damages is sufficient. See *National, etc. v. Kelling, Rivoli, etc. v. Loews* and also *Stevens v. Foster*,

et al., cited in the *Rivoli* case, all *supra*. In fact the allegations, when compared with those cited in the *Stevens* case, are much more specific. In addition, please note paragraph 91 of the complaint set forth on pages 33 and 34 and in which it is alleged that the general conspiracy was a fraud upon appellants and the purpose of which was the financial destruction of appellants. Also, please see paragraphs 92, 93 and 94 on page 34 of our Opening Brief.

The foregoing comments are applicable to subdivision 2, page 73 of appellees' Brief with the additional comment that such subdivision 2 deals with questions of fact such as whether or not there was ore in the mine as discussed on pages 74 and 75. The discussion of such facts is not pertinent upon these present motions nor is the rule of *Momand v. Universal*, cited on page 75, here applicable, for the reference of the complaint to the 1942 sale and contract is a specific damaging action.

Counsel endeavor in this portion of their Brief to raise and comment upon questions of fact—the same purpose as is present throughout their Brief. They attempt to escape the rule against the presentation of facts on these motions by constantly referring and discussing them hoping that ultimately they may persuade the mind of this court to overlook the rule against factual discussions in such proceedings as the present. We respectfully request this court not to be lured by any such siren song as was, we believe, the fate of the lower court. The rule as to facts on these motions is perfectly clear and established and by reason thereof a motion for summary judgment cannot be turned into a trial upon the issues presented, nor can the affidavits filed in support thereof contradict the allegations of the complaint.

We respectfully submit that the lower court grievously erred on this point alone, sufficiently so to warrant the reversal of this case.

**As to the Claim That the Court Below Did Not Err
in Refusing to Permit Appellants to Amend**

Strictly speaking, the motion in question was not a motion to amend the complaint but *one for an order amending the judgment* by adding a paragraph thereto "that, plaintiffs above-named, may, if they so elect, *move this court for an order* permitting them to amend their complaint, etc." Naturally, no suggested amendment to the complaint was served with such motion by reason of the fact that appellants could not make such motion without the preceding amendment of the order of the court permitting them so to do. The present situation is parallel to that cited in *Market v. Swift*, 173 F.(2d) 517 [2nd Cir.] wherein the court states on page 519 "technically, the judgment of dismissal should be re-opened before an amendment to the complaint is granted. Such relief can be sought within ten (10) days under Federal Rules of Civil Procedure, Rule 59, 28 U.S.C.A., and then the running of the appeal time F.R. 73(a) is automatically suspended." By reason thereof all that is said by counsel as to the failure to submit a suggested amendment falls of its own weight. The propriety of the suggested amendment and the right to file the same could not be presented until after the court had amended its order permitting such action on the part of appellants; we re-affirm the statements and authorities set forth in our Opening at pages 84 to 87 inclusive. Especially is this so in view of the fact that in its opinion the lower court referred in several instances to the failure of the complaint to allege various facts which the lower court deemed necessary. Due to the fact that a motion to dismiss has taken the place of a demurrer and that the practice had always been to permit corrections in a complaint after the sustaining of a demurrer, there would seem to be absolutely no reason whatsoever why appellants should not have been granted such a right. In fact, common justice would seem to require the same. The present Rules of Civil Procedure, particularly Rule 15(a), lay down a general policy as to amend-

ments when they provide "and leave (to amend) shall be freely given when justice so requires." In view of the criticisms of the lower court as to the complaint we respectfully submit that justice required the granting of a right to amend to enable appellants to overcome the objections to the complaint suggested by the lower court. It has been the general practice of these courts for years to give plaintiffs every opportunity to state properly a cause of action, and the fact that plaintiffs may have previously filed two short amendments to the complaint, one as a matter of right and another by permission of the court not objected to by counsel, is immaterial as against the present facts.

This cause is of great importance to appellants and we respectfully submit that if there were any deficiencies in the complaint in the manner referred to by the lower court appellants should have been given the right to present at least their suggested amendments; it was an abuse of discretion to refuse to amend its order to such extent. Such refusal is so far afield from the usual and general practice as to call for relief from this court.

The question of the moratorium referred to on page 66 of appellees' Brief and the applicability of a plea of the statute of limitations on a motion to dismiss and for summary judgment will be discussed in our reply to the brief of American Potash and Chemical Corporation.

V.

As to the Contention Re Razor's Estate

On page 78 counsel refer to the motions of Bank of America as Executor of Razor's estate. This point has no place on this appeal for no ruling was made by the lower court on the motion referred to and no appeal was taken by any party from the failure of the lower court so to do. Therefore, the thoughts expressed by counsel are purely gratuitous and have no basis on this appeal whatsoever. Nevertheless, counsel engage in another discussion of facts concerning this contention; it would not be possible without evidence produced on a trial to determine whether or not Razor's estate gained by his activities. In addition, it makes no difference whether such estate gained or

not so far as this conspiracy is concerned for if Razor did not benefit financially, he certainly was a party of the conspiracy as alleged in the amendment and is therefore liable. The points of law raised are settled by the following authorities, viz:

United Copper Sec. Co. v. Amalgamated Copper Co. (2d Cir.), 232 F. 574.

There it was held:

"Where recovery for the results of a monopolistic conspiracy is sought under Sherman Act, Sec. 7, the action will survive against the estate of decedent, in case he secured some benefit at the expense of plaintiff."

The Circuit Court of this Circuit in *Hicks v. Bekins etc.*, 87 F.2d 583 (9th), held that an action to recover treble damages for violation of the Sherman Act is not an action to recover a penalty and survives the death of the injured party and is assignable. This demonstrates conclusively that a Sherman Act suit is not a tort action as claimed by counsel for a tort action does not survive.

Counsel further attempt to divide the Bank of America into two parts: one for Northern California and one for Southern California; but there is no merit in such claim for the Bank is one corporation throughout the state, the home office of which is in San Francisco. Rule 4(f) covers this situation and when such rule is read in connection with Sec. 113, T. 28 U.S.C.A. and Sec. 15, T. 15 U.S.C.A., the claim that the District Court of this district has jurisdiction is unquestionable.

This whole Razor situation is an attempt to turn this Court into a *nisi prius* forum—a suggestion that this Court enlarge its own jurisdiction. Such purpose falls in its own statement.

CONCLUSION AS TO BRIEF OF BORAX CONSOLIDATED, LTD., ET ALS.

Appellants respectfully submit that:

1. The *Burnham* case came to this court after a trial of the facts of the statute of limitations and the rules applicable to

such a record are entirely different from those applicable to the present record based upon the complaint and the two motions. Accordingly, the rules announced in the *Burnham* case have no application to the present situation.

2. Questions of fact cannot be determined by the court upon such motions presented herein. All that can be determined (from the complaint and the motions) is whether or not a question of fact exists; if so, the motions to dismiss and for summary judgment must be denied. Here the record discloses without contradiction that the lower court directly passed upon facts presented by such motions and their supporting affidavits and in so doing erred to the extent of requiring this court to reverse.

3. A consideration of the two releases urged by appellees is not permissible herein; first, because the Rules of Civil Procedure provide to the contrary and that any such defense of release must be set forth in a responsive and affirmative plea and, secondly, because such releases raise nothing but questions of fact which cannot be passed upon on the present state of the record.

4. The lower court erred in refusing to amend its order to the extent of permitting appellants to make a motion to amend their complaint.

5. The statute of limitations cannot be urged upon, or in support, of these motions. (Rule 8(e) is controlling.)

6. This is a case of a continuing conspiracy and the rule of *U. S. v. Kissel, supra*, is applicable.

7. The Statute of Limitations does not begin to run until the completion of the last overt act. (*Hedderly v. U. S.*, 193 Fed. at 569—(9th Cir.); *Fiswick v. U. S.*, 329 U.S. 211; *Brown v. Elliott*, 225 U.S. 392.)

By reason of the foregoing, it is respectfully submitted that the judgment of the lower court should be reversed.

REPLY OF APPELLANTS TO BRIEF OF APPELLEE AMERICAN POTASH & CHEMICAL CORPORATION

As to the Summary of Argument (Pages 2-4)

Again counsel refer to the *Burnham* case as conclusive on this appeal and again we answer with the same contentions as set forth in the first portion of our reply to the brief of the British defendants. The same issues as presented on the *Burnham* record are not presented herein and counsel grievously err when they so state on page 2 of their brief, that the principal issues presented by this appeal have already been considered by this Court in the *Burnham* case. Likewise, on page 3 where counsel allege, "although the District Court relied upon the *Burnham* decision as dispositive of most of the issues presented by appellants and repeated here, appellants completely ignore this Court's decision." Such a statement is incorrect. Not only because the record herein presents issues entirely different from those in the *Burnham* case but also because this Court in the *Burnham* case did not pass directly upon some of the legal issues presented on that appeal.

The questions referred to by counsel on page 4 all have to do with *factual* situations which cannot be considered on this appeal.

I.

As to the Claim That the District Court Properly Held That the Action Was Barred by the Statute of Limitations and That Such Statute Might Be Properly Raised by a Motion to Dismiss.

Counsel admit (on p. 5) the authorities cited by appellants on this point in their Opening and in turn cite four different Circuit Court cases, not one of which was an antitrust case and not one of which discusses specifically Rule 8(c) which provides specifically that the Statute of Limitations must be pleaded as an affirmative defense, and providing:

"In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, dis-

charge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, *statute of limitations*, waiver, and any other matter constituting an avoidance or affirmative defense."

Here is a definite, distinct and unqualified rule and if the wording thereof means anything it is that the plea of the statute must be presented by an affirmative defense and not by way of motion. The authorities cited by counsel, as well as their own claims, have to do with Rule 12(b) and assert that the right to plead the statute on a motion arises under Subdivision (6) reading, "failure to state a claim upon which relief can be granted"; no reference whatsoever is made to Rule 8(c) where the pleading of the statute on a motion is absolutely prohibited. Inasmuch as Rule 8(c) specifically includes the Statute of Limitations and directs how it shall be advanced, such rule dominates and leaves no reason or right to eliminate it by an implied inclusion under Subd. (6) of Rule 12 which does not even mention the statute.

In addition to the authorities cited by us on this point (Our Opening Br. pp. 79-81), permit us to refer to the following cases which have come to our attention since the filing of our Opening:

Wilson v. Seas Shipping Co., 78 Fed. Supp. 464 (Penn.), holds definitely that the question of a statute of limitations may not be raised on a motion to dismiss, citing *Kranshaar v. Lesching*, 4 F.R.D. 143, and *Carlisle v. Kelly*, 72 Fed. Supp. 326; also, *Zimmerman v. Poindexter*, 78 Fed. Supp. 420 (Hawaii). In that case both a motion to dismiss and one for summary judgment were based on the ground of the Statute of Limitations. The court held that so long as the summary judgment called for a determination of a question of fact involving the tolling of the statute, the question of such statute could not be raised on a motion to dismiss. Such is the present case, for here a question of the tolling of the statute arises which must be determined

as an issue of fact on both the motion to dismiss and for summary judgment and, therefore, it is not permissible for appellees to urge such statute in support of such motions.

This is a very important point and one which has not been passed upon by the Supreme Court, and we therefore respectfully request a direct ruling by this Court upon such question. If this Court holds that Rule 8(c) is controlling, all of the contentions made by counsel as to the Statute of Limitations must be denied and the judgment of the lower court reversed. The *Burnham* case did hold that the statute was applicable to the facts presented therein but such ruling was made after a trial of the facts on the merits and before a jury. Therefore, the point presented in the *Burnham* case is entirely distinct from that herein presented.

As to the Claim That the Complaint Showed on Its Face That the Action Was Barred by the Statute (Page 7)

The action was not barred by the three-year statute because the complaint does show on its face that the action came within the exceptions permitted in the California statute by reason of the fraud and misrepresentation of the defendants; also by the Moratorium which we shall hereafter discuss. As shown in our Opening Brief, the California rule and the statute provide that where there is fraud or concealment the statute does not begin to run until the discovery of the cause of action. The authorities to that effect are set forth fully in our Opening Brief, commencing with page 67. Counsel deny that fraud or concealment are disclosed by such complaint but do not state in particular where the complaint is faulty in that respect, so that nothing but a reading of the complaint by this Court will place it in a position to determine such question. The allegations set forth in Paragraph 83 of the Complaint (page 19 our Opening), disclose the activities of appellees, particularly as to the bankruptcy proceedings appearing on page 21. Therein is set forth one of the most vicious and wicked attempts to put a company out of business

that can be imagined, and to read the story of such proceedings by which the Suckow Company was brought under the control of the Bankruptcy Court (all admitted by appellees) is to make one flare with indignation. Such is true of all of the steps throughout such bankruptcy proceeding; we submit that such proceeding alone completely puts to shame all claim that could possibly be made by counsel that no fraud or concealment exists in this particular case. The facts herein are so much more virulent and fraudulent than those presented in the *Burnham* case that there can be no comparison. Once a fraud or concealment is presented the wording and rule of the exception to the California statute immediately come into being, and the statute is tolled until the true facts are discovered as held to be the rule by this Court in *Fleishhacker v. Blum*, *supra*.

The commencement of the Government actions against most of these defendants in September 1944 placed appellants on notice.

On page 10, counsel cite from the opinion of the District Court (R. 619) a statement that a mere denial of a violation of law does not constitute a concealment upon the injured party and that the statute is not tolled thereby. To any such rule that may exist there is the further rule that while a man so charged may not be required to answer, still if he does elect to do so he must reply truthfully and state the facts and his failure so to do constitutes fraud. See *Pashley v. P. G. & E.*, 25 Cal. (2) 226 at p. 235, and citing other California cases to such point. Here the Record shows (R. 477 et seq.) by the affidavit of Mr. Tobeler that when appellees were charged with being monopolists, A. W. Ashburn, one of their attorneys, wrote the Judge in Los Angeles a letter denying the charges of appellants that the British defendants were monopolists in any sense of the word. Furthermore, as shown (R. 478) in such affidavit, the British appellees again denied in an answer and cross-complaint which they filed the fact that they were a monopoly. This in the face of the fact that subsequently in 1945 and in the Government

suits pending in this District they pleaded *nolle contendere* to the charges of the Government and paid a large fine by reason thereof. Therefore, we submit that appellees are within the exception to the California statute even if the question of such statute can be raised on such motions as are here presented.

II.

As to the Claim That the District Court Did Not Err in Dismissing the Complaint on the Motion for Summary Judgment (Page 11)

Under such point it is claimed that the District Court properly ruled that the affidavits and exhibits established that there was no genuine issue of fact to be tried. That is not a correct statement of the situation for there is not one word to such effect in the opinion and judgment of the Court. No reference is made to the affidavits or the pleadings as not raising genuine issues of fact to be tried. The lower Court never passed upon such point. It is impossible to deny with good faith that the affidavits and pleadings presented herein do not raise issues of fact, so all of the authorities cited on pages 12 and 13 of counsel's brief are inapplicable. Furthermore, counsel make only general allegations and fail to point out in what respect the complaint is guilty of conclusions of law. In our Opening Brief (pp. 49 et seq.), we set forth the specific instances of questions of fact raised by the affidavits and cite the authorities in connection therewith. The rule laid down by this Court in *Detsch v. American, Etc.*, 152 F.(2) 473, is controlling herein. No criticism is made by counsel of the authorities cited by appellants; such authorities must therefore be taken as admitted.

As to the Claim That the District Court Properly Ruled That the Facts Established There Was No Fraudulent Concealment (Page 14)

We find no such specific ruling on the part of the lower Court, and counsel cite no portions of the opinion in support of any such statement. The rest of this subdivision is a discus-

sion of the facts alleged in certain of the affidavits of appellees filed in support of their motions and which, pursuant to the authorities cited in our Opening, is not permissible on such an appeal as the present.

In passing, however, we might add that the quotations from various pleadings referred to on pp. 14-17 of counsel's brief had reference to a conspiracy of 1927, not to that of 1929. Counsel complain because we do not quote from the reply affidavits of Mr. Tobeler and Mr. Buren (R. 484; R. 570), explaining the use of the words "Borax Trust" and other similar charges. This is an invitation to enter into a discussion of the facts, which have no place on these motions and which invitation we decline.

III.

As to the Claim That "The Moratorium Act of October 10, 1942 Is Not Applicable to Suits by Private Parties" (Page 17)

Herein is another claim by counsel that the statute in question does not mean what it clearly states. Similar to the claim previously made by counsel that the wording of Rule 8(c), wherein it is provided that the plea of the statute of limitations must be made by affirmative allegations and cannot be presented on a motion to dismiss, does not mean what it plainly states.

The contention that the Act of Congress imposing a moratorium upon "the running of any existing statute of limitation applicable to the violations of the antitrust laws of the United States," does not apply to private suits for triple damages is quite without foundation. The argument by the appellees, which presumes to separate suits brought by the government from those instituted by private persons, where the Congress has made no such separation, is beset with error. It runs in the face of established principles of interpretation, neglects the situation which the statute was invoked to redress; ignores the rationale which shaped the provisions, omits important parts of the legislative history, and for the plain words of the Act sets down

inferences arrived at by illogical deduction. The contention demands criticism and correction in some detail.

1. NO EXTENDED GLOSS IS NECESSARY TO MAKE CLEAR THE MEANING OF THE ACT.

The salient words are applicable to violations:

*"The running of any existing statute of limitations applicable to violations of the antitrust laws of the United States, now indictable or subject to civil proceedings under any existing statute shall be suspended" * * **

as amended "until June 30, 1946." This language speaks for itself, without benefit of any gossamer web of interpretation. The terms in which it is written are as inclusive as the Congress could make them. It is the running of "any existing statute" which is suspended. The suspension is in respect to "violations of the antitrust laws of the United States," not specific violations of particular antitrust laws. The "antitrust laws" have by the Congress been defined to include the Sherman Act, certain sections of the Wilson Tariff Act, as amended, and the Clayton Act. (See Act of Congress of October 15, 1914, 15 U.S.C. Sec. 12, commonly known as the Clayton Act, Section 1.) The only qualification is that the violations are now "indictable or subject to civil proceedings." A criminal indictment may be brought only by the government; a civil proceeding may be instituted either by the government or by a private party. And the prosecution or civil proceeding may be brought "under any existing statute." The antitrust laws in terms of function do three distinct things: they specify offenses against the law and set down penalties; they give standing to sue and make available causes of action to the government and to private parties; they confer necessary powers of enforcement upon the courts. In all the antitrust laws the right of suit for the private person is as clearly recognized as that of the government. In the moratorium statute every term employed is of inclusion; not a phrase or a word is used to indicate that the private action is to be excluded.

A general presumption of judicial interpretation is that the Congress is quite capable of saying what it means. The burden of showing that legislative intent is something different from legislative decree rests squarely upon the party who challenges "the plain and obvious meaning of the language." In the Sherman Act the Congress in separate provisions, because the causes of action are different, provides for suits by the government and by private parties. In the Clayton Act, it makes specific provision for the private triple damage action,³ and goes so far as separately to assign to the Interstate Commerce Commission, the Federal Communications Commission, the Federal Reserve Board, and the Federal Trade Commission its own distinct sphere of enforcement.⁴ In the Clayton Act, it sharply distinguishes the government from the private suit; provides that "a final judgment or decree" in a suit by the government, whether civil or criminal, "shall be prima facie evidence against the defendant * * * in any suit brought by any other party against such defendant"; and suspends the statute of limitations in private suits during the period the government is for the same offense taking action against the same parties. The Congress not only can—but in respect to the antitrust laws invariably does—distinguish between public and private actions when it desires to make a difference. But it does not follow that, if the Congress makes a distinction when a difference is intended, that it must maintain the distinction when the interest is that the public and private suits are to be treated alike.

The attempt of the respondents to amend the language of the statute by substituting their own inference for its words rests upon logical magic. They argue that "when Congress intended to suspend the running of the statute of limitations with respect to private suits, it was able to and did use clear language to accomplish its purpose." But, in Section 5 of the Clayton Act,

³Section 4, 15 M.S.C. Sec. 16.

⁴Section 4, 15 M.S.C. Sec. 4.

⁵Section 11, 15 U.S.C. Sec. 21.

it was only in respect to private suits, that the running of the statute was suspended. It distinguished, when it intended a difference; it does not follow that it had to distinguish when no difference was intended. It may be that an omission in a later statute of language used in a former, "is not to be attributed to oversight." But, again it does not follow that the use of the language to make a necessary distinction demands its use where no difference is to be made. The language of Mr. Justice Holmes in *Wheeler v. Greene*, 280 U.S. 49—even if it meant what it is said to mean—has not even a remote bearing upon the interpretation of the statute. If the Act makes no specific mention of the private suit, it makes no specific mention of the suit by the government. It is in fact silent—intentionally silent—about who it is that brings the suit. The statute is suspended in all cases "now indictable or subject to civil proceeding." The Congress, through deliberate search, could not have found broader or more inclusive words in which to write its mandate.

However, the questions raised by counsel are settled by the recent decisions of the Supreme Court in the cases *Ex parte Collett*, 69 S.Ct. 944; *Kilpatrick v. Texas, etc.*, 69 S.Ct. 953, and *United States v. National City Lines*, 69 S.Ct. 955. All of these cases are reported in Advance Sheet No. 16 of Vol. 69 and dated June 15, 1949. All three of these cases were decided on May 31, 1949.

In the *Collett* case, it was held that:

"Legislative history need not be referred to in construing statute where statutory language is clear."

"The plain words and meaning of a statute cannot be overcome by legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."

"Legislative history of section of revised judicial code providing that for the convenience of parties and witnesses, in the interest of justice, a District Court may transfer *any civil action* to any other district or division where it might have been brought, failed to reveal that Congress

intended that actions under Federal Employers' Liability Act should be excluded therefrom."

On page 947, the court said:

"Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of Sec. 1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco v. Walling*, 1945, 324 U.S. 244; 260, 65 S.Ct. 605, 614, 89 L.Ed. 921. This canon of construction has received consistent adherence in our decisions." Citing cases.

Applying this ruling to the present discussion: The statute in question herein is plain and clear, and is in part as follows:

"The running of *any existing statute* of limitations applicable to violations of the antitrust laws of the United States, now indictable or *subject to civil proceedings under any existing statutes*, * * *."

The words "under any existing statutes" are exactly similar to the words "any civil action" present in the *Collett* case. On page 946 of such case, the court states:

"The court below relied on the language of Sec. 1404 (a), *supra*, which it regarded as "unambiguous, direct, clear." We agree. The reach of "any civil action" is unmistakable. The phrase is used without qualification, without hint that some should be excluded. From the statutory text alone, it is impossible to read the section as excising this case from "any civil action."

The following paragraph of the opinion discusses with particularity the contention of counsel in such case and which the Court will find interesting in its comparison to the situation presented herein. This *Collett* case involved the Federal Employers' Liability Act.

The *Kilpatrick* case also involved the same Act, while *United States v. National City* involved the antitrust laws. On page 956, the Chief Justice states:

"The issue here is whether the 1948 revision of the Judicial Code, Title 28, United States Code, 28 U.S.C.A. Sec. 1 et seq., extends the doctrine of *forum non conveniens* to antitrust suits.

The Court held in the affirmative so that we already have a decision of our highest court to the effect that the construction established in the *Collett* case will be applied to antitrust litigation.

2. THE LEGISLATIVE HISTORY OF THE MORATORIUM STATUTE REMOVES ALL DOUBT THAT IT WAS INTENDED TO APPLY TO PRIVATE AS WELL AS TO PUBLIC SUITS.

If counsels' statutory interpretation is pretentious imagination, their legislative history is a distorted record. It is incomplete; the excerpts from debates and reports is selective; the objectives the statute was intended to serve are withheld. It is clear that the Act of October 10, 1942, was meant to apply—so far as applicable—to government suits. It does not follow that it was not meant to apply to private suits. It did "protect the rights of the Government to proceed at a later date" (Res. Br. p. 47); it does not follow that it sacrificed the rights of private parties who, involved in the war effort, were then unable to prosecute their suits. It did "give the Department of Justice a greater length of time in which to prosecute these cases (Res. Br. p. 48); it does not follow that private suitors were not given as great a length of time. Its provisions mention neither government nor private party; the argument that the government was meant to be served does not prove that private parties were to be excluded.

A true account of the legislative history speaks for itself. It does not have to be fitted out with a host of inferences, logomachies, and false sequiturs to tell its story. This history is

marked by three pivotal events, the "gentlemen's agreement" between the Department of Justice and the military; the unsuccessful attempt to suspend the antitrust laws for the duration of the war; and the eventual passage of the compromise bill, the so-called moratorium, whose meaning is being questioned by the respondents here. Each of these, in its order, deserves brief discussion.

A. An informal arrangement, in nowise involving legislative action, was entered into on March 20, 1942, between the Attorney General on one hand and the Secretaries of War and Navy on the other. This arrangement, embodied in an exchange of letters,⁶ was subject to the oversight of the President. By its terms, any antitrust suit brought—or about to be brought—by the government was to be suspended, or to be held in abeyance, if in the judgment of the Secretaries of War and Navy it threatened to interfere with the war effort. It was felt that the defense of antitrust suits imposed a heavy burden in time, attention and money outlay upon large corporations and their staffs; and that their executives particularly ought to be free to give their attention exclusively to the business created by war orders.

The gentlemen's agreement was made public; and full publicity was given to subsequent acts of the Department of Justice in arresting cases. The argument was faithfully lived up to by all parties to it. No charge has been made that the military took advantage of it to extend immunity where the war effort was not involved. And the Secretary of War is on record that in its practical operation, he had no complaint to make against the Attorney General. But, as the weeks passed, it became increasingly to be felt by the military that it was beset with two shortcomings. The first and less serious was that, because of its informal character, the Secretaries of War and Navy

⁶This arrangement is embodied in two letters dated March 20, 1942, copies of which may be found in No. 1592, 77th Cong. 2nd Sess. (1942); H.R. Rep. No. 2480, 77th Cong., 2nd Sess. (1942); and 10 U.S.L. Week 2621 (March 31, 1942).

could not give to manufacturers and munition makers assurance of the security they demanded against having to answer for previous violations of the antitrust laws. The second and more disturbing was the limited scope of the agreement. The Attorney General, in entering the agreement, could only bind himself and his Department; he could not speak for, or swear away the rights of private parties given by law standing to sue for violations of the antitrust acts. And private suits for triple damages, predicated upon exactly the same violations for which the government could go into court, involved the same vexation, the same time-consuming, the same preparation of an endless sequence of documents as suits brought by the government. It was a more formal arrangement and security against being harassed with private suits which actual and potential war contractors voiced to the Secretaries of War and Navy. These protests impelled the military, with the Secretary of War in the lead, to ask the Congress to meet the situation with appropriate legislation.

B. Accordingly a bill was drawn, under the direction of Robert Patterson, the then Secretary of War, which is set forth in full in the margin.⁷ The bill was not primarily designed to arrest the government's action; that had already been accomplished by the gentlemen's agreement which was then working smoothly. It was intended essentially completely to arrest

⁷A Bill to suspend the operation of the antitrust laws and Federal Trade Commission Act in certain instances requisite to the prosecution of the war.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the Chairman of the War Production Board shall certify to the Attorney General in writing that the doing of any act or thing, or the omission to do any act or thing, by one or more persons (during the period that this Act is in effect) in compliance with any written regulation, order, request, or approval of the said Chairman in which it is specifically set forth that such act, thing, or omission is requisite to the prosecution of the war, such specific act, thing, or omission shall not be deemed in violation of the antitrust laws of the United States or of the Federal Trade Commission Act, if the Attorney General shall find that the regulation, order, require, or approval is in effect an order or a direction requisite to the prosecution of the war, and is not an unlawful delegation of discretion to a private group.

actions by private parties, whether injured parties or stockholders. Accordingly, this bill did not concern itself with procedural questions, such as parties, standing to sue and limitation on actions. Instead, its thrust was directly at the law of antitrust. It suspended all those sections in the antitrust law which define and specify breaches of the law. It was intended to make legal conduct—such as restraint of trade—which heretofore had been illegal. The technique of the bill was not to sterilize the party plaintiff, whether government or private person; it was rather to confer upon the defendant—actual or potential—immunity to the law. Thus the change in the substantive law would give security against suit from any quarter. The condition was that the corporation which sought its benefits should submit a plan of operation to the military for approval and should conduct itself in accordance with the plan to be submitted. Note the breadth of the immunity granted; the bill went beyond the gentlemen's agreement to stop private triple damage as well as public suits.

The bill (S. 2431, 77th Congress)—about which the respondents are strangely silent—was sponsored by the Attorney General and by the Secretaries of War and Navy. The close scrutiny of its provisions and the full debate leave no doubt of the objectives it was meant to serve. A passage between Mr. Sumners, the Chairman of the Judiciary Committee of the House, and Mr. Francis Biddle, the Attorney-General, in respect to what the gentlemen's agreement did not yield, and what the proposed bill offered, is in point.

Mr. Sumners: "Let me ask you this question, Mr. Attorney General. Even if these agencies or these persons would get what you would give under the pressure of public necessity, a sort of clearance, is it considered that that would protect them against private prosecutions by persons who claimed they had been injured by the violation?"

Mr. Biddle: "No, I do not think so."

Mr. Sumners: "That requires this sort of legislation to cover that kind of cases?"

Mr. Biddle: "Yes.

Mr. Sumners: "Or some sort of legislation to cover treble damage claims, and so forth?

Mr. Biddle: "Yes, it is necessary, no doubt about that."⁸

The Secretary of War also appeared as a witness, and was even more specific than the Attorney General as to the real necessity which prompted the bill. He was insistent that the proposed legislation should in nowise be confused with the informal arrangement then in use. If, under the proposed bill, there was to be immunity from the antitrust laws, it would not be in respect to voluntary conduct, but under the oversight of the authorities. As Mr. Patterson put it:

"That arrangement relates to pending and prospective cases where the defendants are alleged to have violated the law of their own volition and without any direction or authority from an authorized Government department or agency. In such case no defendants are to be exonerated and the trials are to be, at the most, postponed during the war because the full time and attention of the defendants are required in the war effort.

"As the President has said, the war effort comes first.

"The proposed legislation is complementary to the arrangement of March 20. It covers a related, but different aspect of the problem. It applies to current action of industry at the request or direction of the Chairman of the War Production Board, which action, if not so directed or authorized, might be in conflict with the antitrust laws. In such case the legislation exempts from prosecution and civil suit persons who act in compliance with governmental direction."⁹

Mr. Patterson makes it clear that the proposed bill is but a mere Congressional underwriting of the gentlemen's agreement; that it is "complementary" to, rather than identical with, the

⁸Hearings Before Subcommittee of the Committee on the Judiciary, United States Senate, S. 2431, May 28, 1942, 77th Congress, 2nd Session.

⁹Page 29, Hearings Before Subcommittee of the Committee on the Judiciary, United States Senate, S. 2431, May 28, 1942, 77th Congress, 2nd Session.

informal procedure then employed. And he is specific in respect to the new ground which is to be covered:

"Furthermore, even if criminal prosecution were clearly eliminated by the clearance method, the industry involved might still be liable to civil treble damage suits under the antitrust laws or stockholders' suits of an harassing nature."¹⁰

and, as his colloquy with Senator O'Mahoney shows, it is not the suits instituted by the government about which he is concerned; on that front he has no quarrel:

Senator O'Mahoney: "* * * Can you give us any example, or do you know of any case in which confusion has been created by the present process or in which delay may be attributed to the action of the Department of Justice under the present plan?"

Mr. Patterson: "No, sir. I am not critical of the present arrangement, except the obvious things that were mentioned by Mr. Biddle. The present arrangements do not do enough.

"The present arrangements do not give the people entering them the slightest security against civil suits by private persons. Other than that, I have no criticism of it."¹¹

To the same effect is a statement by Mr. William R. Boyd, Jr., Chairman of the Petroleum Industry War Council:

"Personally I am very happy to know that all of the agencies of the Government are interested in obtaining for industry clearances from the danger of prosecution, the danger of treble damage suits which may ensue later on."¹²

And the character of the bill, and the theme of the proposed legislation were reiterated, without a voice in opposition in a three-way conversation between Senator Hughes, the Attorney General and the Secretary of War:

¹⁰Ibid., page 30.

¹¹Ibid., page 37.

¹²Ibid., page 35.

Senator Hughes: "Mr. Chairman, it was just running through my mind that we have been laying some stress on these civil suits that some of us fear. How can that be met in this legislation?"

Mr. Patterson: "This just says it does not violate the law. In those cases, that takes the ground out from under any stockholder who wants to start suit, no question about that."

Senator Hughes: "That is an expression by us that it does not violate the law, but I wonder how far they would feel safe in violating the law?"

Mr. Biddle: "The treble damages are provided in the Sherman Act, and if the Sherman Act is modified, no one has any basis for bringing the suit."¹³

C. The Patterson proposal, S. 2413, was never enacted by the Congress. The legislative history reveals no opposition to the ends it sought to accomplish. There was, however, reluctance on the part of the Congress to grant immunity to a course of business conduct in violation of the antitrust laws, even though it was carried on in wartime and under the supervision of the War Production Board. Another approach might be made to lead to the same objectives. So a compromise was denied; S. 2413 was dropped; and S. 2731, arresting "the running of all statutes of limitation applicable to the violation of the antitrust laws * * * no indictment or civil proceeding"¹⁴ was put in its place, passed by two houses, and approved by the President. Its general language, reflecting legislative deliberation as just recited, is written in terms as broad as the right to sue set down in the antitrust acts.¹⁵ Its attention had been fully called to the hazard to the war effort presented by the triple damage action; and, had the Congress been of a mind to exclude the private

¹³Ibid., page 38.

¹⁴56 Stat. 781 (1942), as amended, Public Law 107, Act of June 30, 1945, C. 213, 79th Congress, 1st Session.

¹⁵Sen. Rep. 1592, 77th Cong. 2nd Session (1942); H.R. Rep. No. 2480, 77th Cong. 2nd Session (1942). The language in both reports is identical.

antitrust suit from the moratorium, it was quite capable of finding the proper words.

The respondents are quite correct in stating that the Congress has passed an Act establishing a moratorium on statutes of limitation in respect to frauds upon the government. And it is true that at one time it was proposed to amend the fraud bill (H.R. 6484) to comprehend antitrust violations as well. But the fact is that the Congress refused to so amend, and insisted upon writing a separate Act for antitrust is significant.¹⁶ In respect to the security for which the war contracts asked, the Act as passed (S. 2731) gave virtually the same security as the War-Navy sponsored bill, S. 2413. Its plain and obvious meaning is in strict accord with the intent of the Congress as revealed in the legislative history.

The defects in the contentions of the respondents are manifest. They make no reference to S. 2413, which provoked debate and led to the statement of legislative intent. They are right in saying that the gentlemen's agreement applied only to government suits; they are wrong in failing to note that the legislative act is "complementary to" and not an underwriting of, the informal understanding. They stress the advantage to the Department of Justice in having a "longer time"; but seem to conclude that in some way such an advantage is not accorded a private suiter. A number of the fragments which they present as legislative history are true enough. The bother is that, torn

¹⁶Counsel assert a parallelism between H.R. 6486, the fraud statute, and S. 2731, the antitrust statute, and argue that since the fraud statute is clearly limited to suits brought by the government, it follows that the antitrust statute is so limited. For the argument the parallel is a very unfortunate one. In respect to frauds against the government, the private action goes far back in legal history. It has found expression in a Congressional statute, conferring upon the person who discovers the fraud the right to sue. In fact, the private party is permitted to bring suit in the name of the United States. 18 U.S.C.A. Sections 80, 82-86; 31 U.S.C.A. 231-234. Standing to sue in such a case has recently been accorded full recognition by the United States Supreme Court. *U. S. ex rel. Marcus v. Hess*, 317 U.S. 537. The same usage, beaten into its modern statutory form, finds expression in the triple damage antitrust action.

from the whole story, they give a distorted picture. And together they fall short of providing that in applying the moratorium to all violations of antitrust laws, now indictable or subject to civil proceeding, the Congress did not mean what it said.

3. THE RATIONALE OF THE STATUTE COMPELS THE CONCLUSION THAT IT WAS INTENDED TO ARREST ALL ANTITRUST SUITS, PUBLIC AND PRIVATE, FOR THE DURATION OF THE WAR.

The statute of limitations is not of great importance in suits brought by the government. It is only on rare occasions that the Department of Justice finds it necessary to consider it. The government, unlike a private corporation, does not go out of business. The violators of the antitrust laws do not usually revise their patterns of trade-practice or amend their restraining ways except as a result of, or to prevent, court action. If it does not institute a criminal prosecution at a particular time, the situation usually invites it—with no bar by the statute of limitations when the government is ready to act. The great majority of its cases are, however, not criminal actions, but suits in equity. And equity addressed to the future, aims at injunctive relief against wrongs which are current. It considers the past only as a method of analysis and discovery—to reveal the nature and magnitude of the “wrongs” against which relief is sought. In criminal suits, the government needs little protection against the running of a statute of limitations. In respect to civil actions it needs none whatsoever. It is to be assumed that when the Congress decreed that the moratorium applied to “civil proceedings” it was issuing a command, not uttering meaningless words. It would have to apply to private actions, or “it would have no application.”

For in respect to private antitrust actions, the statute is of utmost consequence. The private person cannot institute a criminal prosecution. He can, and often does, resort to equity, in seeking security against the wrongful conduct of which he complains. But his principal demand is compensation for the injury already done to him. The action in equity by a private party is

usually grafted upon the suit for damages. In fact, it is in respect to this private suit for triple damages that the statute of limitations has its practical field of use. Outside of this field, its employment is highly exceptional.

The private party, unlike the government, cannot adopt a policy of watchful waiting, allow the wrongdoing to continue with impunity, and strike when it is ready to do so. It must sue in respect to its own injury. That injury may be a mortal blow which puts it completely out of business. The statute of limitations measures the period of time within which, after the last injury, suit must be instituted. It is here and here alone that the running of the statute of limitations is a hazard to action. It is in respect to the private suit for damage, and only in respect to such a suit that the moratorium statute can give any practical relief. To make the moratorium statute apply to suits in equity by the government—where it has no application—and to deny it application to the private suit for damages—where alone it can give any relief—is making irony a dominant factor in statutory interpretation.

Here the argument of counsel is further vitiated by a misconception of the character and function of the suit for triple damage. This private suit is the oldest and best established of the causes of action through which the substantive law against restraints and monopolies is enforced. As long ago as 1623, it was lifted from the common law into the Statute of Monopolies, and from that classic document carried over directly into the Sherman Act. Its roots go back to the use of the informer, who was permitted—and induced—to take to the law to vindicate the public interest. The award of triple damage does not—and never was intended to—constitute a windfall to the successful litigant; it was set up as an inducement to private persons to bring to the attention of the courts breaches of the antitrust laws which were manifests of public policy. The course was taken off the action by the informer through making it a condition of such an action that the plaintiff was to sue because of an injury

to him in property or business. The provisions in the Sherman and Clayton acts which establish the injured individuals which invite such actions, go no further than establish standing to sue.¹⁷ The causes of action are exactly the same as those for which the government institutes criminal proceedings or resorts to equity. In antitrust there is one single body of substantive law, towards the enforcement of which the Congress has equipped both the government and the individual with appropriate remedies. Like the government, the injured individual may bring his suit "by reason of anything forbidden in the antitrust laws." The public character of the private suit has sometimes been overlooked by lawyers and judges whose experience has been largely in the field of private law. But the history, the intent of the Congress, and the rationale of the suit for triple damages are all clear. In bringing his action, the injured individual is an instrument of law enforcement; in seeking redress for his own grievance, he is helping to vindicate a wrong against the public.

And, if instead of considering the plaintiff, we look at it from the standpoint of the actual or potential defendant, the conclusion is equally clear. The moratorium statute was passed as a compromise between what the military wanted and what the Congress was willing to grant. The military was transmitting the pressures put upon it by manufacturers—the great number being "big business"—who were reluctant to become war contractors unless they could be given adequate security against the harassment of antitrust suits. In respect to the government such protection had already been given by the gentlemen's agreement. Nor, in all save the exceptional case, did the government require any statute of limitations to protect its opportunity of future action. *If an antitrust suit harasses, it harasses whether the plaintiff is the government or an individual. It is a task of the first magnitude to defend an antitrust suit, that task is not les-*

¹⁷Section 7 of the Sherman Act, Section 4 of the Clayton Act, U.S.C. Sec. 15.

sened because of the public or private character of the complainant. If there is a threat to the defendant's business in such a suit, it lies in the private action. The criminal prosecution results in a small fine; the decree of equity is only an injunction to good works. The real teeth in the antitrust laws is the tripling of damage for injury done, an assessment which can run into very large figures. And, whereas the government usually brings only a single action—though occasionally it may resort both to criminal prosecution and civil procedure—a pattern of illegal practice is likely to injure many parties, and the defendant as a consequence to be exposed to a multiplicity of suits. It just does not make sense that the Congress would protect war contractors against a lesser danger, when protection against such danger had already been secured, and leave them at the mercy of the greater danger. The rationale of the moratorium act makes clear its coverage of all actions, civil and criminal, public or private for violations of the antitrust laws. Thus from whatever angle one looks at it, the conclusion is inescapable. The rulings of the Supreme Court on similar statutes, the accepted methods of statutory interpretation, the legislative history of the measure, and the rationale of the statute, all unite to indicate that Congress meant exactly what it said; that “the running of any existing statute of limitations applicable to violations of the antitrust laws of the United States, now indictable or subject to civil proceedings under any existing statute “shall be suspended” until June 30, 1946.

Therefore, to sum up the questions as to the Statute and its applicability hereto:

If the claim of appellants that the statute cannot be urged on these motions, or if the conspiracy of 1929 is a continuing conspiracy as urged, or if the statute does not begin to run until the completion of the last overt act, the statute becomes of no moment herein and the cause must be reversed; BUT if no one of such three possibilities above set forth is held to be applicable, the question of the Moratorium arises. In such event,

appellants contend that on all wrongs occurring during the Moratorium period, the statute did not begin to run until June 30, 1946—the terminating period of the Moratorium—and on those overt acts prior to the enactment of the Moratorium (October 10, 1942), the statute was stayed during the period of its effectiveness.

CONCLUSION

Appellants submit that the judgment of the lower Court should be reversed for the following reasons:

1. The lower Court erred in permitting the plea of the Statute of Limitations in the face of Rule 8(c), and in holding that "no cause of action lies by reason of the bar of the applicability of the California Statute of Limitations" (R. 621). Rule 8(c) is plain and clear and means just what it states and such Court had no right to ignore it. It stands unchallenged, is the law of the land, and should, we respectfully contend, be applied here in order to do justice to appellants. While such point has never been, so far as we are advised, passed upon by the Supreme Court, other than by its adoption of the Rule, such Court did approve the Rules including 8(c) and we respectfully submit that until such Court rules otherwise, such Rule should be observed as written. This does not mean that appellees will be precluded from asserting such plea, for it can be urged by them in their responsive pleading, namely, their answers, and the question could then be presented on the trial of the cause.

2. The same contentions urged as to the Statute of Limitations are applicable to the questions of "release," and the Court grievously erred in accepting, discussing and passing upon such plea on these motions, all in violation of the provisions of Rule 8(c). Furthermore, the Court passed upon *questions of fact* concerning such "releases" and thus violated the rulings of all Federal courts prohibiting such rulings on motions of this character.

3. Such Court erred in passing and ruling upon various other *fact issues* presented by the affidavits filed in support of the

motions presented by appellees, some of which instances are set forth on pages 48 to 52, inclusive, of our Opening Brief. Appellants have set forth in their Opening and in this Reply Brief many authorities holding with their contention on this point and to which we respectfully refer. Illustrations of such activities on the part of the lower Court appear on pages 50-52, inclusive, of our Opening Brief. As soon as the affidavits disclosed that such questions of fact were presented the motions to dismiss should have been denied as stated in *Frederick Hart & Co. v. Recordgraph Corp.*, 169 Fed.(2) 580, at p. 583.

4. The lower Court erred in holding (R. 621) that no cause of action lies herein "by reason of the failure of the complaint to state a claim upon which relief may be granted." The salient portions of the complaint are set forth in our Opening Brief and do, we submit, allege a cause of action that comes within the rule of *Stevens Co. v. Foster & Kleiser* and other authorities cited on page 46 of our Opening Brief. It is impossible to conceive how the lower Court could have made such a ruling in the face of the admitted allegations of the complaint which set forth a most vicious and determined plan and conspiracy to destroy these appellants; also the activities of appellees thereunder and of the specific wrongs and damages suffered by appellants as a result of appellees' activities. We respectfully request a reading of the complaint as set forth in our Opening Brief, for we feel assured that no party can do so without indignation arising within him that such conditions could exist in this country. Especially is this so in the face of the admissions of appellees as described with particularity in our Opening at pages 40 to 44, inclusive, and to which we respectfully request the attention of this Court; we call especial attention to Paragraphs 7, 8 and 10 of such admissions. Appellees admit the allegations of the complaint in its entirety and figuratively laugh at the antitrust laws of the land by the motions and pleas which the lower Court allowed them to advance. In this connection, we refer again to the case of *Albert Pick-Barth v. Mitchell*, cited on page 58 of our Opening.

5. The lower Court failed to pass upon the question of the Moratorium, referred to on page 61 of our Opening Brief. It also erred in failing to find that such Moratorium was applicable hereto, in part at least, and tolled the Statute of Limitations. On pages 615 and 616 of the Record, the lower Court in its decision refers to the Moratorium but makes no further reference or ruling.

6. The lower Court erred in refusing the application of appellants to amend its judgment to the extent of allowing appellants to file motions to amend their complaint.

7. Such Court erred in its ruling on other points involved and indicated in the two briefs of appellants.

Respectfully submitted,

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August 22, 1949.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, deceased, and RUTH E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, WESTERN BORAX COMPANY, LTD., GOLDFIELDS AMERICAN DEVELOPMENT COMPANY, PACIFIC ALKALI COMPANY, F. LESSER, JAMES M. GERSTLEY, FRANK M. JENIFER, P. C. BAKER, ALLEN W. ASHBURN, WALTER A. MOSES, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION as Executor of the Last Will and Testament of Clarence McAnisse Razor, deceased, and BEN H. BROWN, as Special Administrator of the Estate of Victor C. Emden, deceased, *et al.*,

Appellees.

MEMORANDUM OF APPELLEE AMERICAN POTASH & CHEMICAL CORPORATION IN RESPONSE TO REPLY BRIEF OF APPELLANTS RE APPLICATION OF MORATORIUM ACT TO PRIVATE SUITS

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SUBJECT INDEX

| | PAGE |
|--|------|
| (a) THE WORDING OF THE ACT OF OCTOBER 10, 1942 SHOWS CLEARLY THAT PRIVATE ACTIONS ARE NOT INCLUDED | 2 |
| (b) RESORT TO LEGISLATIVE HISTORY IS APPROPRI- ATE TO ASCERTAIN THE MEANING OF THE STAT- UTE | 5 |
| (c) THE HEARINGS ON S. 2431 ARE NOT PART OF THE LEGISLATIVE HISTORY OF S. 2731 WHICH BECAME THE MORATORIUM ACT | 7 |
| (d) THE LEGISLATIVE HISTORY OF THE MORATORIUM ACT DISPELS ANY DOUBT THAT IT IS NOT APPLI- CABLE TO PRIVATE ACTIONS | 12 |

TABLE OF AUTHORITIES

Cases Cited

| | |
|--|-------|
| <i>Church of Holy Trinity v. U. S.</i> , 143 U. S. 457, 36 L. Ed. 226, 12 S. Ct. 511 (1892) | 6, 14 |
| <i>Ex parte Collett</i> , 69 Sup. Ct. 944, 93 L. Ed. 901 (1949) | 5, 6 |
| <i>Foley Bros. v. Filardo</i> , 336 U. S. 281, 93 L. Ed. 531, 69 S. Ct. 575 (1949) | 5 |
| <i>Ginsburg & Sons v. Popkin</i> , 285 U. S. 204, 76 L. Ed. 704, 52 S. Ct. 322 (1932) | 2 |

| | |
|--|------|
| <i>Gompers v. U. S.</i> , 233 U. S. 604, 58 L. Ed. 1115, 34 S. Ct. 693 (1914) | 3 |
| <i>Kilpatrick v. Texas, etc.</i> , 69 Sup. Ct. 953, 93 L. Ed. 912 (1949) | 5, 6 |
| <i>Kordell v. U. S.</i> , 335 U. S. 345, 93 L. Ed. 73 (1948) .. | 4 |
| <i>Matson Navigation Co. v. War Damage Corp.</i> , 172 F. 2d 942 (C. A. 9), (1949), cert. den. June 20, 1949, 93 L. Ed. 1466 | 5 |
| <i>Myers v. U. S.</i> , 264 U. S. 95, 68 L. Ed. 577, 44 S. Ct. 272 (1924) | 3 |
| <i>Platt v. Union Pacific Ry. Co.</i> , 99 U. S. 48, 25 L. Ed. 424 (1879) | 2 |
| <i>Stockwell v. U. S.</i> , 13 Wall 531, 543, 20 L. Ed. 491 (1871) | 3 |
| <i>U. S. v. Addyston Pipe & Steel Co.</i> , 85 Fed. 271 (1898) affd. 175 U. S. 211, 44 L. Ed. 136 (1899) | 3 |
| <i>U. S. v. Adielizzio</i> , (C. C. A. 2nd) 77 F. 2d 841 (1935) | 4 |
| <i>U. S. v. American Truck</i> , 310 U. S. 534, 84 L. Ed. 1345 (1940) | 5 |
| <i>U. S. v. Goldman</i> , 277 U. S. 229, 72 L. Ed. 862, 48 S. Ct. 486 (1928) | 3 |
| <i>U. S. v. National City Lines</i> , 69 Sup. Ct. 955, 93 L. Ed. 914, (1949) | 5, 6 |
| <i>U. S. v. Rosenbloom Truck</i> , 315 U. S. 50, 55, 86 L. Ed. 671 (1942) | 5 |
| <i>U. S. v. United Mine Workers of America</i> , 330 U. S. 258, 91 L. Ed. 884, 67 S. Ct. 677 (1947) | 3 |
| <i>Vermilya-Brown Co. v. Connell</i> , 335 U. S. 847, 93 L. Ed. 99 (1948) | 4 |
| <i>Walling v. Crane</i> , 158 F. 2d 80, 83 (C. C. A. 5) (1946) | 3 |

Statutes

| | PAGE |
|---|-------|
| U. S. Code, Title 15, Sections 1, 2 | 6 |
| U. S. Code, Title 15, Section 4 | 4, 6 |
| U. S. Code, Title 15, Section 6 | 3, 4 |
| U. S. Code, Title 15, Section 11 | 3 |
| U. S. Code, Title 15, Section 15 | 3 |
| U. S. Code, Title 15, Section 16 | 3 |
| U. S. Code, Title 15, Section 21 | 3, 4 |
| U. S. Code, Title 15, Section 21(a) | 4 |
| U. S. Code, Title 15, Section 23 | 4 |
| U. S. Code, Title 15, Section 26 | 4 |
| U. S. Code, Title 15, Section 44 | 3 |
| U. S. Code, Title 15, Section 45(1) | 3 |
| U. S. Code, Title 18, Section 139 | 5 |
| U. S. Code, Title 28, Section 1404(a) | 6 |
| U. S. Code, Title 28, Section 2462 | 3 |
| U. S. Code, Title 45, Sections 51-59 | 6 |
| U. S. Code, Title 46, Section 687 | 4 |
| Act of October 10, 1942 | 2, 14 |
| Small Business Mobilization Act, Section 12, June 11, 1942 | 7, 11 |
| Public Law No. 107, 79th Congress, 1st Session | 13 |

No. 12,158

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SUCKOW BORAX MINES CONSOLIDATED,
INC., *et al.*,

Appellants.

vs.

BORAX CONSOLIDATED LTD., *et al.*,

Appellees.

MEMORANDUM OF APPELLEE AMERICAN POTASH & CHEMICAL CORPORATION IN RESPONSE TO REPLY BRIEF OF APPELLANTS RE APPLICATION OF MORATORIUM ACT TO PRIVATE SUITS

Appellants' Reply Brief states (page 26) that this appellee contends that the Moratorium Act of October 10, 1942, does not mean what it clearly states. It is submitted that appellants failed to apprehend what the Act clearly states. What the Act means is shown by analysis of its wording, by analysis of its legislative history, and by analysis of its policy. Failing to find any support for their construction of the statute in its legislative history, they have attempted to confuse this Court by referring to the legislative history of an entirely different bill (S. 2431) and making the entirely erroneous statement that the moratorium statute was the result of a "compromise".

**(a) THE WORDING OF THE ACT OF OCTOBER 10, 1942
SHOWS CLEARLY THAT PRIVATE ACTIONS ARE NOT
INCLUDED.**

Legislative words presumably have meaning and courts must try to find it. The statute in question here reads:

“The running of any existing Statute of Limitations applicable to *violations* of the antitrust laws of the United States, now indictable or subject to civil proceedings . . . shall be suspended . . .” (Italics supplied).

Obviously the limiting clause “now indictable or subject to civil proceedings” has a purpose. Surplus words cannot be attributed to statute draftsmen. *D. Ginsburg & Sons v. Popkin*, 285 U. S. 204, 76 L. Ed. 704, 52 S. Ct. 322 (1932); *Platt v. Union Pacific Ry. Company*, 99 U. S. 48, 25 L. Ed. 424 (1879). If this clause were omitted from the statute, then the statute might have the meaning for which appellants contend; it might include private-party treble damage suits because it would include *all* suits under the antitrust laws. But the clause was deliberately inserted. Its purpose was to exclude *some* litigation under the antitrust laws from the moratorium.

The language of the Moratorium Act clearly implies that the words “civil proceedings” in the phrase “now indictable or subject to civil proceedings” mean civil proceedings initiated by the Government under the antitrust laws. They do not mean civil proceedings initiated by private parties. When Congress talks about two types of proceedings to which the Act is to apply—one, an indictment, and the other, a civil proceeding—it is talking about proceedings initiated by the Government. The relation of

the words "now indictable" with the words "civil proceedings" in the same phrase clearly suggests an intention to classify things of the same general character in the same phraseology. Accordingly, when Congress mentions civil proceedings with the words "now indictable", it means civil proceedings brought by the Government, and not actions by private persons.*

As already pointed out (pages 18-19 of appellee's original brief) Congress can and did clearly define what it meant when it intended to refer to treble damage suits in Section 5 of the Clayton Act (15 U. S. C. 16). Congress referred to a private action in 15 U. S. C. 15 in this language: "Any person who shall be injured in his business or property by reason of anything *forbidden* in the antitrust laws may *sue*." (Italics supplied) Congress used entirely different language in reference to Government suits.

*There are a variety of civil proceedings which the Government may institute under the antitrust laws. In addition to suits for injunction and divestiture, there are: (a) Proceedings for contempt of an injunctive decree; these are civil proceedings subject to the three year statute of limitations. *U. S. v. Goldman*, 277 U. S. 229, 72 L. Ed. 862, 48 S. Ct. 486 (1928); Cf. *Walling v. Crane*, 158 F. 2d 80, 83 (C. C. A. 5) (1946); *Myers v. U. S.*, 264 U. S. 95, 68 L. Ed. 577, 44 S. Ct. 272 (1924); *U. S. v. United Mine Workers of America*, 330 U. S. 258, 91 L. Ed. 884, 67 S. Ct. 677 (1947); *Gompers v. U. S.*, 233 U. S. 604, 58 L. Ed. 1115, 34 S. Ct. 693 (1914); (b) Proceedings to forfeit property in transit, under 15 U. S. C. Sections 6 and 11; these are civil proceedings [*Stockwell v. U. S.*, 13 Wall 531, 543, 20 L. Ed. 491 (1871); *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (1898), *affd.* 175 U. S. 211, 44 L. Ed. 136 (1899)] governed by a 5-year statute, 28 U. S. C. Sec. 2462; (c) Suits to recover a civil penalty under 15 U. S. C. Sec. 45(1) for disobedience of a cease and desist order of the Federal Trade Commission, which are antitrust proceedings (Cf. 15 U. S. C. Sections 21 and 44) and are subject to the 5-year statute prescribed by 28 U. S. C. Section 2462.

In 15 U. S. C. 4 the word "proceeding" is used to describe civil suits by the Government. In 15 U. S. C. 6 "proceeding" is again used in reference to property forfeiture. In 15 U. S. C. 21, conferring authority on the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board (all governmental agencies) and the Board of Governors of the Federal Reserve System (a quasi-governmental agency) words such as "violations" and "proceeding" repeatedly appear. "Proceeding" is again the chosen word in 15 U. S. C. 21(a) in reference to Federal Trade Commission orders. In 15 U. S. C. 23 "violation" is again used to refer to criminal actions brought by the Government. Both "violations" and "proceedings" are used in 15 U. S. C. 26 to refer to Government actions.

In statutory construction the Supreme Court has a frankly varied set of standards. Consistency in its opinions is found only in relation to types of statutes construed. Only a few examples need be cited where courts gave a construction different from what one party contended was the clear meaning of a statute.

In *Vermilya-Brown Co. v. Connell*, 335 U. S. 847, 93 L. Ed. 99 (1948), "possession" of the United States (therefore construed to include only enumerated islands) was held, for the purposes of the Fair Labor Standards Act, to include land leased by the Government in Bermuda. In *Kordell v. United States*, 335 U. S. 345, 93 L. Ed. 73 (1948), labels "accompanying such matters" (under the Pure Food and Drug Act) were held to include literature mailed separately as much as a year after shipment of the goods. In *United States v. Adielizzio* (C. C. A. 2nd), 77 F. 2d 841 (1935), one statute (46 U. S. C. A. 687) described

Seaman's Protective Certificates as "certificates of citizenship". Another statute (18 U. S. C. A. 139) made it a crime to falsely or fraudulently procure or possess "any certificate of citizenship". Yet it was held on appeal, after close examination of the statutory wording and legislative history, that the convictions below should be reversed on the ground that falsely procuring a seamen's certificate of citizenship was not falsely procuring a certificate of citizenship. See, also, *Foley Bros. v. Filardo*, 336 U. S. 281, 93 L. Ed. 531, 69 S. Ct. 575 (1949); *Matson Navigation Company v. War Damage Corporation*, 172 F. 2d 942, (C. A. 9) (1949), cert. den. June 20, 1949, 93 L. Ed. 1466.

This type of statutory interpretation is, in fact, frequently encountered. Even if the construction contended for by appellants might be considered as within the meaning of the words used in the statute, it is plainly at variance with the policy of the legislation, and the courts will follow the legislative purpose. *United States v. Rosenbloom Truck*, 315 U. S. 50, 55, 86 L. Ed. 671 (1942); *United States v. American Truck*, 310 U. S. 534, 84 L. Ed. 1345 (1940).

(b) RESORT TO LEGISLATIVE HISTORY IS APPROPRIATE TO ASCERTAIN THE MEANING OF THE STATUTE.

Appellants contend that the meaning they ascribe to the words "civil proceedings" is the *only* correct one—and this meaning is "clear". They contend that clear language makes reference to legislative history unnecessary and cite *Ex parte Collett*, 69 Sup. Ct. 944, 93 L. Ed. 901, *Kilpatrick v. Texas, etc.*, 69 Sup. Ct. 953, 93 L. Ed. 912, and *United States v. National City Lines*, 69 Sup. Ct. 955, 93 L. Ed.

914, all decided May 31, 1949 (Reply Brief, p. 29). All three cases involved interpretation of the words "any civil action" in Section 1404(a) of the Revised Judicial Code (Title 28 U. S. C.). The cases merely hold that this section is applicable to the Federal Employees Liability Act (45 U. S. C. 51-59) (*Collett* and *Kilpatrick*) and to the Sherman Act (15 U. S. C. 1, 2, 4) (*National City Lines*). The problem of interpreting statutes is aptly presented in the *Collett* case where Chief Justice Vinson, although stating the language under consideration was clear, nevertheless devoted five pages to discussion of the legislative history of the statute there involved, to prove that the meaning he attributed to the words was correct.

Appellants claim (Reply Brief, p. 30) that "under any existing statute" in the moratorium statute here involved is "exactly similar" to "any civil action" in the statute involved in *Collett*. This comparison indicates the appellants' misunderstanding of the point involved. The important question before this Court is not the sweep of the words "any existing statute", but it is what actions did Congress mean to cover when it used the modifying, limiting clause "now indictable or subject to civil proceedings". To determine this it is necessary to refer to the legislative history.

This procedure is long recognized and quite permissible under the decision in *Church of Holy Trinity v. United States*, 143 U. S. 457, 36 L. Ed. 226, 12 S. Ct. 511 (1892), where it is said:

"* * * It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and

the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. * * *

* * * *

“Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.”

(c) THE HEARINGS ON S. 2431 ARE NOT PART OF THE LEGISLATIVE HISTORY OF S. 2731 WHICH BECAME THE MORATORIUM ACT.

Appellants contend that appellees' statutory interpretation is "pretentious imagination" and our legislative history a "distorted" and "incomplete" record. Having thus characterized appellees' discussion on this subject, appellants seriously ask this Court to consider and study as part of the legislative history of the moratorium statute excerpts from hearings on another bill (S. 2431) which was separate and distinct from the moratorium bill. The statement at page 37 of appellants' brief that the proposal was never enacted into law is incorrect. It was, in substance, enacted into law as Section 12 of the Small Business Mobilization Act,

June 11, 1942, Public Law No. 603, 77th Congress, 2nd Session.*

A careful reading of the hearings on S. 2431, referred to by appellants, discloses that substantially the same bill as that submitted by Mr. Patterson, Acting Secretary of War, Mr. Forrestal, Acting Secretary of the Navy, and Mr. Nelson, Chairman, War Production Board, to Senator Van Nuys, Chairman, Committee on the Judiciary, United States Senate, had been passed by the House as an amendment to the Small Business Mobilization Bill, which already had been passed by the Senate. As a consequence, that measure was in conference between the conferees of the Senate and the House at the time hearings on S. 2431 were

*Sec. 12. Whenever the Chairman of the War Production Board shall, after consultation with the Attorney General, find, and so certify to the Attorney General in writing, that the doing of any act or thing, or the omission to do any act or thing, by one or more persons during the period that this section is in effect, in compliance with any request or approval made by the Chairman in writing, is requisite to the prosecution of the war, such act, thing or omission shall be deemed in the public interest and no prosecution or *civil action* shall be commenced with reference thereto under the anti-trust laws of the United States or the Federal Trade Commission Act. Such finding and certificate may in his discretion be withdrawn at any time by the Chairman by giving notice of such withdrawal to the Attorney General, whereupon the provisions of this section shall not apply to any subsequent act or omission by reason of such finding or certificate.

* * * * *

This section shall remain in force until six months after the termination of the present war or until such earlier time as the Congress by concurrent resolution or the President may designate, but no prosecution or *civil action* shall be commenced thereafter with reference to any act or omission occurring prior thereto if such prosecution or *civil action* would be barred by this section if it remained in force. [June 11, 1942, Public Law No. 603, Sec. 12, 77th Cong., 2nd Sess.] (Italics supplied.)

held. Notice of this Hearing was given in the Senate the day before the hearing was held and that the "reason for the bill in the first place would be examined." Accordingly, the conference members of both Houses were invited to be present in order to learn more clearly the reasons for the legislation. Those who appeared and presented statements concerning the measure were Hon. Francis Biddle, Hon. Robert Patterson, and Hon. William R. Boyd, Jr. The hearing on S. 2431, therefore, was for the purpose of assisting the conferees of both Houses in determining what should be done with the amendment to the Small Business Mobilization Bill which was added by the House after the bill had passed the Senate.* This is clearly indicated also by the statement of the Attorney General at Page 12 of the hearing that he had in mind the later promotion and passage of a bill to suspend the statute of limitations as it applied to Government suits under the antitrust laws even though the measure then under consideration was enacted. He said:

"May I say one other thing, Mr. Chairman, before I come to the discussion of the bill before us, and that is that another expression of part of that general plan was the passage of the statute of limitations recommended by the President in his release.

"That statute has not been passed. It would be a modification of the present statute of limitations so as to apply not only to cases of fraud, as incorporated in Judge Sumner's bill, H.R. 6484, which was introduced before this other plan had come up for discussion, but it also, of course, specifically covers the Antitrust Act.

*See Pages 5 and 6 of the hearings before the Sub-Committee of the Committee on the Judiciary, United States Senate, S. 2431, May 28, 1942, 77th Congress, 2nd Session.

"I know that this is not the place to discuss that now, but I hope, Mr. Chairman, you will bear that in mind. I think it is very important to have the whole picture properly developed, and the statute expanding the statute of limitations should be a balanced part of the general program.

"Senator O'Mahoney. Do you have a copy of Judge Sumner's bill?

"Mr. Biddle. I have a copy of it.

"Senator O'Mahoney. May I suggest that you insert it in the record at this point?

"Mr. Biddle. I will be very glad to submit this H.R. 6484. That, as I say, applies to frauds against the Government but does not cover the Antitrust Act."

In connection with this latter statement it is significant to note that the Senate and House Judiciary Committees in reporting S. 2731 to the House with the recommendation that the bill be passed said:

"This committee has previously reported favorably the bill (H.R. 6484) to suspend the running of the statute of limitations applicable to frauds against the United States, which bill has been enacted into law, approved by the President and is Public Law No. 706. This bill (S. 2731) will accomplish the same purpose as to violations of the antitrust laws, both civil and criminal."

The foregoing clearly shows that the Senate Committee on the Judiciary had under consideration a bill which did not relate to the moratorium statute, which was considered separate and apart from any suspension of the statute of

limitations, and which was enacted four months before the moratorium statute was enacted. All this was done in the light of the information given by the Attorney General that the moratorium statute would be later attended to. It is ludicrous therefore for Appellants to contend at Page 37 of their brief that the moratorium statute was but a compromise of S. 2413, or at Page 38 that the moratorium statute gave virtually the same security as S. 2413. As heretofore indicated, the intent and purpose of the Patterson Bill and of Section 12 of the Small Business Mobilization Act was to exempt certain acts or things certified by the Chairman of the War Production Board to the Attorney General from the provisions of the antitrust laws. The acts and things to be exempted were the acts or things which the War Production Board decreed should be done in the future. The quotations from the hearings on S. 2413 in appellants' brief do show that the Senate intended to absolve business from private actions as well as Government proceedings. And the statute carefully referred to "civil actions" as well as prosecutions to show this interest. On the other hand, the Moratorium Act did not exempt from the antitrust laws any specific acts. It merely suspended the application of the statute to acts or conduct which are "now indictable or subject to civil proceedings" by the United States Government.

In the light of the foregoing, it is misleading and wholly unfair to suggest to this Court that it consider as part of the legislative history of the moratorium statute the hearings on a bill which was enacted before the moratorium statute was passed, and which had no positive relation to any suspension of the statute of limitations.

(d) THE LEGISLATIVE HISTORY OF THE MORATORIUM ACT DISPELS ANY DOUBT THAT IT IS NOT APPLICABLE TO PRIVATE ACTIONS.

In this appellee's original brief, it set forth in some detail the legislative history of the moratorium statute in order to show that the object and intention of the Congress in enacting it was to provide only for the suspension of the statute of limitations as it may apply to Government suits for violation of the antitrust laws which had been deferred in order to eliminate interference with the war effort. The discussion was confined to the respective reports of the Senate and House Judiciary Committees on the bill when they presented it to Congress with a recommendation for its enactment, plus some slight reference to debates on the bill before the House.

Without repeating what was stated in the original brief, a few supplemental points will aid in dispelling the confusion which appellants sought to engender.

As appellants state (Reply Brief p. 32), an arrangement between the Secretary of War, the Secretary of the Navy and the Attorney General went into effect on March 20, 1942, whereby suits by the Government against violators of the antitrust laws could be deferred in any case where their prosecution would seriously interfere with the war effort. It was not intended, as appellants admit, that the arrangement would extend to private actions for treble damages. The parties to the agreement, in advising the President on March 20, 1942 of its adoption, said: "To make sure that no one escapes by the running of the statute of limitations, we shall request Congress to pass an appropriate extension of the statute." The President, in his letter of March 20 approving the arrangement, stated: "I

note from your memorandum that proper steps will be taken to avoid the running of the statute of limitations in any case." These two letters appear in both the Senate and House Judiciary Committee Reports.

Thus it clearly appears from the Reports that the parties to the agreement and the President were of the express view that any suspension of the statute of limitations would necessarily have to apply only to proceedings initiated by the Government.

In a letter dated August 18, 1942 sent by the Secretary of War, the Secretary of the Navy and the Attorney General to the Speaker of the House, recommending the enactment of S. 2731 and which was also included in the Senate and House Reports, they said:

"* * * A procedure was set up under which anti-trust investigations, prosecutions, or suits would be postponed if it appeared that proceeding therewith would seriously interfere with the war effort. *In such letter we announced our intention to request the Congress to pass an appropriate extension of the statute of limitations applicable to antitrust cases.* A copy of the above-mentioned letter and a copy of the President's reply, which approved the proposed procedure, are enclosed herewith." (Italics supplied)

Further indication that the Moratorium Act was intended by Congress to apply only to Government prosecutions and proceedings is found in the title to the act which extended the moratorium from June 30, 1945 to June 30, 1946. The title of Public Law No. 107, 79th Congress, 1st Session, reads: "An Act to amend the Act suspending until June 30, 1945, the running of the statute of limitations applicable to violations of the antitrust laws, so as to continue such suspension until June 30, 1946".

It is quite clear, therefore, that an examination of the two Reports clearly shows (1) that the proposers of S. 2731 intended that the statute of limitations be suspended only as to cases which were deferred under the arrangement of March 20, 1942, (2) that the members of each of the Senate and House Judiciary Committees clearly understood what was proposed, (3) that they understood that the "bill will accomplish the same purpose as to violations of the anti-trust laws, both civil and criminal" as did Public Law 706 with respect to fraud against the Government, (4) that nowhere in the Reports of the Judiciary Committees is there a suggestion or implication that they intended to cover actions by private parties, and (5) that each of the Committees reported that the bill be passed in the form submitted to them. It is significant that the bill was passed without change.

There was no purpose to be served by suspending any statute of limitations applicable to private actions. There was a purpose to the statute to enable the Government to carry out the "gentlemen's agreement" to defer prosecutions until after the war. Even if private actions could be considered "within the letter of the statute" they are "not within the statute, because not within its spirit, nor within the intention of its makers". *Church of Holy Trinity v. United States, supra*.

When Congress enacted Section 12 of the Small Business Mobilization Act in June 1942, it intended it to be applicable to both Government proceedings and private actions. And it used the term "civil action" to show it included private actions. When it enacted the Moratorium Act a few months later in October 1942, it used different language "civil proceeding" to show the limitation intended.

This was entirely consistent with the distinction in the meaning of those words which Congress has followed throughout the antitrust laws.

Respectfully submitted,

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Dated: September 30 , 1949.

Due service and receipt of a copy of the within is hereby admitted this day of , 1949.

.....

Attorneys for Appellants

IN THE

United States Court of Appeals

For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, et al.,

Appellees.

Supplemental Memorandum on Behalf of Appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, James M. Gerstley, Frank M. Jenifer, Bank of America National Trust & Savings Association as Executor of the Last Will and Testament of Clarence M. Rasor, Stauffer Chemical Company, and West End Chemical Company in Response to Appellants' Reply Brief.

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PAUL P. O'BRIEN,
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INDEX

| | Page |
|---|------|
| 1. The Burnham Decision..... | 2 |
| 2. Sham Allegations Create No Issue..... | 2 |
| 3. Continuing Conspiracy Theory..... | 3 |
| 4. Availability of Defense of Statute of Limitations on Motion..... | 3 |
| 5. "As to the Releases" | 4 |
| 6. Attempt to Go Behind Final Judgments..... | 5 |
| 7. Failure of Allegations of Damage from Alleged Acts of 1942.... | 6 |
| 8. Re Razor's Estate..... | 6 |
| 9. Re Motion to Set Aside Judgment to Permit Third Amend- ment of Complaint..... | 7 |
| 10. Miscellaneous | 8 |

INDEX OF AUTHORITIES

TABLE OF CASES

| | Pages |
|--|---------|
| Alpine Forwarding Co. v. Pennsylvania R. Co., 60 F.2d 734 (2 Cir.), cer. den. 287 U.S. 647..... | 7 |
| American Tube Works v. Bridgewater Iron Co., 132 Fed. 16 (1 Cir.) | 7 |
| Burnham Chemical Company v. Borax Consolidated, Ltd., et al., 170 F.2d 569..... | 2, 3, 4 |
| Christianson v. Gaines, 174 F.2d 534 (C.A., D.C.)..... | 2 |
| City of Oakland v. Oakland Water Front Co., 162 Cal. 675..... | 5 |
| C. E. Stevens Co. v. Foster & Kleiser Co., 311 U.S. 255..... | 6 |
| Farrall v. District of Columbia Amateur Athletic Union, 153 F.2d 647 (C.A., D.C.)..... | 2 |
| Garrett v. Louisville & Nashville R.R. Co., 235 U.S. 308..... | 7 |
| Gifford v. Travelers Protective Assn., 153 F.2d 209 (9 Cir.)..... | 4 |
| Keene v. Leventhal, 165 F.2d 815 (1 Cir.)..... | 4 |
| Kithcart v. Metropolitan Life Ins. Co., 150 F.2d 997 (8 Cir.), cer. den. 326 U.S. 777..... | 7 |
| Lindsey v. Leavy, 149 F.2d 899 (9 Cir.)..... | 2 |
| Markert v. Swift & Co., 173 F.2d 517..... | 7 |
| Montgomery v. Gilbert, 77 F.2d 39 (9 Cir.)..... | 7 |
| Murphy v. City of New York, 83 N.E. 39, 190 N.Y. 413..... | 4 |
| Nashville, etc. Railway Co. v. United States, 113 U.S. 261..... | 5 |
| Nye & Nissen v. United States, 168 F.2d 846..... | 3 |
| Standard Oil Co. v. Clark, Attorney General, 163 F.2d 917 (2 Cir.), cer. den. 333 U.S. 873..... | 5 |
| United States v. Korner, 56 F. Supp. 242..... | 7 |
| Urie v. Thompson, 337 U.S. 163..... | 3 |
| Vines v. General Outdoor Advertising Co., 171 F.2d 487 (2 Cir.).... | 4 |
| Zimmerman v. Poindexter, 78 F. Supp. 421..... | 3 |

TEXTS

| | |
|----------------------------------|---|
| 4 C.J.S. 2007, Section 1386..... | 6 |
|----------------------------------|---|

IN THE
**United States
Court of Appeals**
For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,
Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, et al.,
Appellees.

**Supplemental Memorandum on Behalf of Appellees
Borax Consolidated, Ltd., Pacific Coast Borax
Company, United States Borax Company, James
M. Gerstley, Frank M. Jenifer, Bank of America
National Trust & Savings Association as Execu-
tor of the Last Will and Testament of Clarence
M. Rasor, Stauffer Chemical Company, and West
End Chemical Company in Response to Appel-
lants' Reply Brief.**

Appellants' reply brief makes erroneous statements of fact and cites cases not mentioned in their opening brief although available at the time. The purpose of this supplemental memo-

random is to comment on some of these matters and to cite one case not yet available when our brief was filed.

1. The Burnham Decision

To avoid the controlling effect of this Court's decision in the *Burnham* case, appellants assert repeatedly (e.g., reply brief, 2, 4, 23) that the *Burnham* case was decided after a jury trial and that here there was a summary judgment. The fact is that in the *Burnham* case the jury was discharged without a verdict and the judgment was affirmed by this Court on the ground that it was a proper summary judgment. The issue here is exactly what it was in the *Burnham* case, i.e., was there any genuine issue of fact.

2. Sham Allegations Create No Issue

Appellants (reply brief, 3) in effect admit that the facts shown by defendants' affidavits below are uncontradicted. Their primary if not sole contention is that allegations of a complaint must be taken as true on a motion for summary judgment. There are two answers: (1) There are no sufficient allegations in the complaint (see our brief, e.g., pp. 35-40, 53-55, 59-64, 66-67, 70-76). (2) It is well settled that the allegations of a complaint do not determine a motion for summary judgment, and allegations shown to be sham by affidavit cannot defeat the motion. *Christianson v. Gaines*, 174 F.2d 534, 536 (C.A. D.C., decided April 1949, reported July 1949 after our brief was printed) quotes and approves this Court's decision to that effect in *Lindsey v. Leavy*, 149 F.2d 899. The *Christianson* case is of interest because it is the latest decision on the subject from the court whose decision in *Farrall v. District of Columbia Amateur Athletic Union*, 153 F.2d 647, is the basis of the cases which appellants misconstrue and, so misconstruing, rely upon for their

erroneous contention that allegations of a complaint are unassailable on a motion for summary judgment.

Appellants' reply brief (p. 4) asserts that our brief did not question this contention. On the contrary, we showed it to be unsound (our brief, pp. 41, 42).

3. Continuing Conspiracy Theory

Despite this Court's decision in the *Burnham* case, appellants continue to press the "continuing conspiracy" theory to toll the statute of limitations. *Nye & Nissen v. United States*, 168 F.2d 846, newly cited in the reply brief (p. 11), and the other cases cited again are all criminal cases. *Urie v. Thompson*, 337 U.S. 163 (cited reply brief, p. 10), involved the very special problem of the time of accrual of a cause of action for the occupational disease of silicosis. Its utter irrelevancy is shown by the fact that less than 1½ months before it was decided the Supreme Court denied appellants' petition for rehearing in the *Burnham* case, wherein this Court held the continuing conspiracy theory inapplicable to a civil suit for damages under the antitrust laws.

4. Availability of Defense of Statute of Limitations on Motion

Appellants' reply brief (p. 22) cites four cases not cited in their opening brief as alleged support for their contention that the statute of limitations cannot be raised on a motion to dismiss or for summary judgment. One of them, *Zimmerman v. Poin-dexter*, 78 F. Supp. 420, does not purport to hold so. The other three are from the same district court (E.D. Pa.), two of them by the same judge, and apply the old common law rule which prevails in Pennsylvania and which was long ago replaced in California by the equity rule which has been adopted by the Federal Rules of Civil Procedure (see our brief, pp. 35-36).

These cases are poor law and inconsistent with the decisions of this Court in the *Burnham* case and *Gifford v. Travelers Protective Assn.*, 153 F.2d 209.

5. "As to the Releases"

Under this heading appellants' reply brief (p. 9) merely makes the similar contention that the defense of release cannot be raised until answer. This is not the law (see our brief, pp. 52, 53, and see *supra*). The contention would apply equally well to the defense of the statute of frauds. Yet only recently it has been held that such a defense may be raised on a motion to dismiss. *Keene v. Leventhal*, 165 F.2d 815, 821 (1 Cir.).

Later in the reply brief (p. 13) appellants cite *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487 (2 Cir.), as supposed support for the contention that a release does not cover claims not known at the time it was given. In the first place, the claim of ignorance is pure sham (see our brief, pp. 55, 57). In the second place, the *Vines* case does not support appellants but supports appellees. It did not turn on the releasor's alleged ignorance but on the breadth of construction to be given words of general import when followed or preceded by words relating to specific claims. The court applied a New York rule (the case arising in New York) that where general words are followed or preceded by specific claims, they are limited thereto, unless a contrary intention appears. The court noted that if the releases had contained only the general words, plaintiffs' ignorance would have been irrelevant. The court further said that "In releases, as elsewhere, the intent of the parties is to be gathered from the instrument as a whole," citing *Murphy v. City of New York*, 83 N.E. 39, 190 N.Y. 413, where a release containing general words was given the broadest construction although followed by specific claims.

Now here the 1934 releases specified no particular claims but were cast entirely in broad general terms (quoted, our brief, p. 52). Thus, even under the New York rule these releases bind appellants regardless of alleged ignorance.

In the 1942 release the general and comprehensive words are followed by some specification, but this descent to particulars is prefaced by the words "without limiting the generality of the foregoing release" (quoted, our brief, p. 57).

Further, both the 1934 releases and the 1942 releases, unlike the Vines release which did not specify "unknown claims," conclude with a paragraph (quoted, our brief, p. 54) stating that "It is the specific intent and purpose hereof to release any and all claims * * * of any kind or nature whatsoever, whether known or unknown and whether specifically mentioned herein or not * * * and [whether] intentionally or unintentionally omitted from this release." The intention of a release is to be gathered from the document itself (see our brief, p. 55), and the intention of these releases is unmistakable.

6. Attempt to Go Behind Final Judgments

In attempting to avoid the fact that they seek to go behind final judicial decrees and judgments, appellants' reply brief asserts (p. 7) that the judgments "came as the result of the settlement of controversies" and "so do not possess the character sought to be given them by counsel."

A stipulated judgment is as conclusive as a judgment rendered after trial. *City of Oakland v. Oakland Water-Front Co.*, 162 Cal. 675, 686; *Nashville, etc. Railway Co. v. United States*, 113 U.S. 261; *Standard Oil Co. v. Clark, Attorney General*, 163 F.2d 917, 930 (2 Cir.), *cer. den.* 333 U.S. 873.

Moreover, the judgments were not the result of stipulation but were entered after thorough contest. The subsequent settlement merely led to the dismissal of appeals (see our brief, pp. 59-61).

Dismissal of an appeal leaves a judgment as if no appeal had ever been taken. 4 *C.J.S.* 2007, Sec. 1386.

7. Failure of Allegations of Damage from Alleged Acts of 1942

Denying the elementary rule that a complaint for treble damages must allege facts from which damages are logically and legally inferable, as shown by the numerous treble damage cases cited in our brief, pp. 71, 72, appellants' reply brief (pp. 13, 14) cites cases which do no more than to say that when the allegations of a complaint show logically the fact of damage, general allegations as to amount may be sufficient. But here the complaint fails as to the fact of damages. In *C. E. Stevens Co. v. Foster & Kleiser Co.*, 311 U.S. 255, referred to by appellants, it was not questioned that the complaint alleged facts from which damages logically and legally flowed, but it was argued that the acts so causing damage were in intrastate commerce. Whether this was so was the crux of that case.

Appellants (pp. 14-16) comment on allegations of events culminating in 1934, but this is irrelevant, for the issue here relates to events of 1942. As to that, appellants' discussion is silent. Elsewhere (reply brief, p. 10) appellants assert that the property conveyed in 1942 was of great value, far exceeding the amount received. This simply substitutes assertion for the record, which belies it.

8. Re Rasor's Estate

Appellants contend (reply brief, p. 18) that Rasor's estate may not present the point urged by us (our brief, p. 78) because it was not passed on by the court below. That point was one of the grounds presented below in support of the motion to dismiss. The motion was granted. A judgment must be affirmed, if sustainable on any ground, regardless of the ground on which the lower court bases its action, particularly where

the ground of affirmance was asserted below. *Kithcart v. Metropolitan Life Ins. Co.*, 150 F.2d 997, 1000 (8 Cir.), *cer. den.* 326 U.S. 777; *American Tube Works v. Bridgewater Iron Co.*, 132 Fed. 16 (1 Cir.); *Montgomery v. Gilbert*, 77 F.2d 39 (9 Cir.). Courts of appeal review orders made, not reasons assigned.

On the merits of the point, appellants concede that survivability of a claim against Rasor's estate after his death depends on whether Rasor secured a benefit. Appellants argue that this is a question of proof. But what one must prove he must plead. *Garrett v. Louisville & Nashville R.R. Co.*, 235 U.S. 308, 312; *Alpine Forwarding Co. v. Pennsylvania R. Co.*, 60 F.2d 734 (2 Cir.) (per Learned Hand, J.), *cer. den.* 287 U.S. 647. Where a cause of action is based on an exception to a general rule (here non-survivability of tort claims), the complaint must allege facts to bring the case within the exception. *United States v. Korner*, 56 F. Supp. 242.

The failure to allege benefit to Rasor or to his estate was deliberate, for appellants persisted in the omission after the defect was pointed out and despite subsequent amendment of the complaint. The heirs were entitled to have the estate closed, in the absence of proper allegations.

9. Re Motion to Set Aside Judgment to Permit Third Amendment of Complaint

Appellants' brief (p. 17) cites *Markert v. Swift & Co.*, 173 F.2d 517. In that case, (1) unlike here, there had been no previous amendment to the complaint, and (2) also unlike here, the motion to amend was accompanied by a "proffered amended complaint" (p. 519, 1st col., 1st para.), which the court was able to review (p. 520, 2nd col.).

10. Miscellaneous

Appellants' reply brief (p. 6) attacks our statement that they received over \$600,000 under the 1934 releases. The facts, as shown in Appendix 1 to our brief, are that appellees paid appellants \$150,000 cash,* gave a satisfaction of judgment against Suckow for over \$56,000, obtained a release for appellants of a claim of Gembo for \$140,000, and released the Suckow company from a claim for over \$310,000. This claim was for the taking of 16,291.5 tons of ore. It had already been adjudged and decreed that the ore belonged to appellee, that Suckow company had wrongfully taken the ore, that it should account, and that it should account at the rate of \$21.89 per ton (R. 55). This would bring the claim to over \$350,000. These items total over \$700,000. In addition, appellees released appellants of all claims for damages and profits arising from patent infringement, which had already been established by decree, and gave other considerations not included in the above calculation. The figure of \$600,000 was most conservative.

Appellants say (reply brief, p. 6) that property was conveyed to appellees, as part of the 1934 settlement, containing borax worth millions. The assertion is irrelevant since the essential point is that the 1934 releases involved passage of a very large consideration. Moreover the assertion is unfounded as the record shows, for the complaint alleges that the appellants' borate bearing land had all been conveyed in 1929 to the Suckow company (see our brief, p. 6), had passed into the hand of the trustee in bankruptcy and was leased on a royalty basis; it was not sold or conveyed. The miscellaneous plots conveyed were not alleged to contain borax.

*Appellants' reply brief (p. 10), mistakenly ascribes to our brief a statement that \$350,000 cash was paid in 1934. That sum was paid in 1942.

It is respectfully submitted that the judgment should be affirmed.

Dated: San Francisco, California, October 11, 1949.

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No. 12,158

IN THE
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For the Ninth Circuit

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et al.,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., et al.,

Appellees.

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SUBJECT INDEX

| | Page |
|---|------|
| Reply of Appellants to Supplemental Memoranda of Appellees.. | 1 |
| I. As to the Burnham Decision..... | 1 |
| II. As to the Claim That Sham Allegations Create No Issue | 3 |
| III. As to the Continuing Conspiracy Theory..... | 4 |
| IV. As to the Availability of Defense of Statute of Limita- tions on Motion..... | 4 |
| V. As to the Releases..... | 5 |
| VI. As to Attempt to Go Behind Final Judgments..... | 6 |
| VII. As to the Failure of Allegations of Damage from Alleged Acts of 1942..... | 6 |
| VIII. As to Re Rasor's Estate..... | 7 |
| IX. Re Motion to Set Aside Judgment to Permit Third Amendment of Complaint..... | 7 |
| X. As to "Miscellaneous"..... | 7 |
| As to the Memorandum of Appellee American Potash & Chem- ical Corporation Re Moratorium..... | 9 |
| A. As to the Claim That the Wording of the Act of November, 1942 Shows Clearly That Private Actions Are Not Included..... | 9 |
| B. As to the Claim That the Hearings on S-2431 Are Not Part of the Legislative History of S-2731 Which Became the Moratorium Act..... | 10 |
| C. As to the Legislative History..... | 11 |

TABLE OF AUTHORITIES CITED

| | Pages |
|---|-------|
| CASES | |
| Ex Parte Collett, 69 S. Ct. 944..... | 9 |
| Foster and Kleiser v. Special Site Sign Co., 85 Fed.(2) 742.. | 4 |
| Stephens Co. v. Foster and Kleiser, 311 U.S. 255..... | 4 |
| Toobert v. Woods, 174 Fed.(2) 861 (9th Cir. decided May 7, 1949) | 5 |
| United States v. Kissel, 218 U.S. 601..... | 4 |
| Yurie v. Thompson, 69 S. Ct. p. 1018..... | 6 |
| STATUTES | |
| 16 Cal. Jur., p. 567..... | 5 |

IN THE
United States
Court of Appeals
For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC.,
et al.,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., et al.,

Appellees.

**Reply of Appellants to Supplemental
Memoranda of Appellees**

Appellees American Potash & Chemical Corporation has filed a supplemental memorandum in response to appellants' reply brief discussing solely the question of the Moratorium; the remaining appellees have also filed a supplemental memorandum which in effect is no more than a summary of their reply brief.

We shall reply first to the memorandum of the Borax Consolidated Group.

I.

AS TO THE BURNHAM DECISION

Here it is stated that the Burnham case was not decided after a jury trial and that there was a summary judgment. **This is absolutely incorrect and not the fact!** We are sur-

prised that counsel should make such a statement. The facts are as follows: The complaint was filed; the defendants filed a motion to dismiss and also one for summary judgment. The motion for summary judgment was denied but the court decided to send the case to the jury on the special issue of the statute of limitations and directed defendants to answer as to that point alone. **Accordingly, the defendants filed an answer denying those allegations of the complaint claimed to have tolled the statute of limitations!** The case was then set for trial before a jury. The jury was impaneled and evidence heard for the sole purpose of determining whether or not plaintiff had been in possession of sufficient facts to put it on notice as to the existence of a conspiracy under the antitrust statutes and sufficient to start the running of the statute. Two days of trial were consumed in receiving evidence and at the conclusion of the case of both parties, a motion for an instructed verdict was made by defendants and granted. The court, in effect, entered a verdict for the jury, the court deciding that the evidence showed that the plaintiff was put on notice of the formation of the conspiracy by the defendants through their activities and that it (the plaintiff) should have been able to tell that such conspiracy had been formed and, therefore, should have commenced its action within the statutory period.

Here the situation is entirely different. The complaint herein alleges the facts and was met by a motion to dismiss and also one for summary judgment. Such motions were heard and decided upon the record as it stood; no special issues of fact were presented and, therefore, no answers as such were filed by the defendants. We are therefore confronted by the cold record and the rules of law applicable thereto, namely, that all of the facts of the complaint are admitted to be true and that such facts cannot be controverted by affidavits filed in support of such motion for summary judgment. The authorities in our opening and closing briefs are full and conclusive on these points. Therefore, the Burnham decision is no precedent of any kind for the present situation. The former case was decided on

the merits, while this case is presented strictly on the legal motions.

II.

AS TO THE CLAIM THAT SHAM ALLEGATIONS CREATE NO ISSUE

To escape the rule as to the admission by the appellees as to the facts of the complaint, appellees claim that there are no sufficient allegations in the complaint and that allegations shown to be sham by affidavits can not support the motion. There are two answers to these contentions: (1) It is impossible for any fair-minded person to read the complaint and the charges set forth therein, all of which are admitted by the appellees, without at once realizing the wrongs inflicted upon appellants by the appellees and the great injuries done to them by the fraud and activities of the appellees. This case is so much stronger than most of these treble damage antitrust cases that there is no comparison. Here, the bankruptcy fraud and all of its ramifications, is alone sufficient to bring the defendants within the bar of this court. (2) The rule contended for by counsel is only applicable where a case after a trial on the merits would be subject to a motion to dismiss for failure to state a case. Such is the full purport of the Christianson case cited by counsel. Here most of the allegations set forth in the affidavits filed by appellees in support of their motion are denied by the affidavits of Mr. Tobeler and Mr. Buren. Thus questions of fact have been presented which cannot be passed on in the manner sought by appellees but must be left to a trial on the merits.

In addition, counsel have asked this Court to pass on the questions of fact as to whether the allegations of the complaint are sham and in so doing immediately state themselves out of court, for by the unquestioned line of authority neither this nor the District Court on the hearing of motions such as the present has jurisdiction to pass upon facts.

We cannot bring ourselves to the conclusion that the moral outlook of counsel has become so blasted by contact with

appellees such as they represent herein as to permit them to honestly feel that the facts as alleged in the complaint herein do not constitute wrongs, frauds and evil doings. If such a tendency should be creeping upon counsel we suggest to them a re-reading of *Stephens Co. v. Foster and Kleiser*, 311 U.S. 255.

III.

AS TO THE CONTINUING CONSPIRACY THEORY

Here again counsel attempt to distinguish between civil and criminal cases in the application of the rule of a continuing conspiracy.

So far as we have been able to ascertain no court has ever held that such a distinction exists. *Foster and Kleiser v. Special Site Sign Co.*, 85 Fed.(2) 742, makes passing reference to this distinction but *does not* make a definite holding in connection therewith. Therefore, this particular point is open and we respectfully ask this Court to decide specifically the same. Justice Holmes in deciding *United States v. Kissel*, 218 U.S. 601, did not make any such distinction, nor has counsel ever at any time during their discussion of this particular point afforded any reason why such a distinction should exist.

IV.

AS TO THE AVAILABILITY OF DEFENSE OF STATUTE OF LIMITATIONS ON MOTION

Counsel attempt to brush aside the authorities which we have cited in support of the claim that the statute of limitations cannot be raised by such motions as are here presented by the claim that such cases are poor law and inconsistent with the decisions of this Court in the Burnham and Gifford cases. Neither of such cases held to the contrary of our contention, particularly in the Burnham case, there is no reference whatsoever by the District Court, this Court, or the Supreme Court as to this particular point.

If Rule 8(c) means what it says, there is no answer to such contention for it is definitely laid down in such Rule that the plea of such statute can only be raised as an affirmative defense. There is no ambiguity in the wording of such rule; in fact it is confirmed by Rule 12(b), as set forth on page 79 of our opening. The fact that such question has never definitely been passed upon is immaterial, and we respectfully request that this Court do so on this hearing.

The statute of limitations like the statute of frauds is a personal privilege. Neither of such statutes make a contract or cause of action void in themselves and the defendants do not have to raise such pleas if they are otherwise so inclined; such is the reason of Rules 8 and 12. The recent case of *Toobert v. Woods*, 174 Fed.(2) 861 (9th Cir. decided May 7, 1949), definitely held that the plea of the statute of frauds is a personal plea which may be waived. The same applies to the statute of limitations. See 16 *Cal. Jur.*, p. 567. Therefore, we reiterate that such statute does not in itself invalidate the contract or situation involved but constitutes a personal privilege of the defendant which he does not have to exercise unless he is so inclined and such being the fact the rules govern and such plea must be raised in the form of an affirmative defense.

V.

AS TO THE RELEASES

This point raises the same questions as presented in the foregoing contention as to the statute of limitations. If Rules 8 and 12 mean anything, it is exactly what is set forth therein. There is no ambiguity present and they control such situations exactly as they do any other positions or steps covered by such rules, statements of counsel to the contrary, notwithstanding. Both of the releases in question when read in the light of the facts show conclusively the intention and endeavor to conceal and deceive for had appellees been acting honestly they certainly would have made reference in such releases to the antitrust claims so vigor-

ously pressed at various times by appellants. If the purpose and effect of the rules can be obviated where they are disagreeable to a defendant by the mere statement of counsel that the rules set forth are bad law we would be nowhere and the effect of the Supreme Court's approval and adoption of the rules would be but airy persiflage.

VI.

AS TO ATTEMPT TO GO BEHIND FINAL JUDGMENTS

Of course, a stipulated judgment is as conclusive as a judgment rendered after trial but such rule has no application here for it is not applicable to the present facts. In all of such actions in which the judgments were stipulated there was an appeal pending and part of the settlement of the dispute was the agreement that the appeal should be withdrawn and the judgments allowed to stand as though no appeal had been taken. This was another step in the total fraud intended and imposed by defendants and by no means has the effect desired to be contended for by counsel.

VII.

AS TO THE FAILURE OF ALLEGATIONS OF DAMAGE FROM ALLEGED ACTS OF 1942

This subdivision is no more than a brief summary of what was contained in the answering brief of appellees. In turn, we believe that we have completely answered any such contentions here made by Subdivision (3) of our reply, page 10 thereof, and to which we respectfully refer. In addition, the complaint sets forth, beginning with paragraph 85 thereof (Tr. p. 69) through paragraph 92 (Tr. p. 78), various facts and overt acts occurring subsequent to the 1934 release and which bring the case squarely within the rule of *Yurie v. Thompson*, 69 S. Ct. p. 1018, and referred to at various times in our reply, commencing with page 10, and wherein is also discussed the events occurring after the 1934 release. Such allegations set forth

the activities of the appellees and the overt acts committed subsequent to 1934 and fully warrant all of the comments made by appellants in their reply.

VIII.

AS TO RE RASOR'S ESTATE

We deny that the motion of Rasor's estate was one of the grounds presented below in support of the motion to dismiss. All motions made in behalf of Rasor were sole and separate, involving only the points raised on that particular motion. By no stretch of the imagination can such motion be brought within the folds of the general motion to dismiss. Such was wholly apart from the general motions and must stand on its own legs. No ruling was made by the lower court thereon and, therefore, this Court has no jurisdiction over such motion on this appeal. Furthermore, the authorities cited by us are, we respectfully submit, controlling.

IX.

RE MOTION TO SET ASIDE JUDGMENT TO PERMIT THIRD AMENDMENT OF COMPLAINT

Previous amendments have no bearing on this question for there may be as many amendments as the Court will permit and there are no limitations in the rules or otherwise as to such number of amendments allowable. We reaffirm our statements in our reply on this point.

X.

AS TO "MISCELLANEOUS"

Here counsel endeavor to add up the sums of money involved in the various litigations disposed of by the settlement of 1942 and handle the same as though these cases had gone to final determination on appeal and had been affirmed. Defendants have no right in the particular situation involved to take credit as alleged by them and there is no statement or allegation in

any of the pleadings or affidavits to the effect that such amounts constituted payments on account of the settlement arrived at for the purposes of the 1942 release. In addition, all of such contentions raise *facts* which are not relevant or permissible on these motions.

In failing to refer to Rules 8 and 12 in replying to subdivisions (9) and (10) of appellees' supplemental memorandum, we do not mean to waive such points and again contend that neither the question of the "statute" nor "release" can be raised on these motions.

For the reasons set forth herein, as well as those appearing in the reply of appellants to the briefs of appellees, we respectfully submit that the judgment should be reversed.

As to the Memorandum of Appellee American Potash & Chemical Corporation Re Moratorium

A. AS TO THE CLAIM THAT THE WORDING OF THE ACT OF NOVEMBER, 1942 SHOWS CLEARLY THAT PRIVATE ACTIONS ARE NOT INCLUDED.

We are yet unable to ascertain by what method of reasoning counsel reaches such a conclusion in the face of the very clear wording of the Act in question and of the Rules definitely laid down in the recent case of *Ex Parte Collett*, 69 S. Ct. 944 and the two other cases decided by the Supreme Court upon the same day. These are set forth on page 29 of appellants' reply to the briefs of appellees. Such decisions dispose completely of the contentions made by counsel in their original reply brief and also in their memorandum. The construction contended for by counsel is strained and without basis in fact or in law now that the *Collett*, et al. cases have been announced. Counsel, in effect, admit that if the word "action" had been used, they would have no case with respect to the statute. This effort to obviate the clear words of a statute is extremely dangerous for to permit such practice would be to open up every case involving a statute to an interpretation of what the enacting body meant. To permit such practice would be to create chaos in the trial of causes and would be to substitute the thoughts of various witnesses as to what the enacting body meant or had in mind when the provision in question was passed, no matter how clear the wording of the act. It is only in extreme cases of questionable interpretation or of doubt that reference to legislative intent can with safety be applicable. This is the effect of the *Collett*, et al. cases and evidently the Supreme Court had such possibilities in mind when it stated:

"The plain words and meaning of a statute cannot be overcome by legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."

There seem to be no such instance as contended for by counsel in the use of the words in the United States Code. Section 16 uses the word "proceeding" with reference to a private suit.

B. AS TO THE CLAIM THAT THE HEARINGS ON S-2431 ARE NOT PART OF THE LEGISLATIVE HISTORY OF S-2731 WHICH BECAME THE MORATORIUM ACT.

While the two bills may have been separate in their presentation they, nevertheless, had the same purpose in end, that is, to secure the business people with whom the Government desired to continue large war-time operations against liabilities under the antitrust laws. The fact that various bills may have been introduced in an effort to accomplish the purpose desired does not detract from the fact that they were all presented and considered as part of the legislative history of the act which finally emerged from such Congressional considerations and discussions. The paragraph cited by counsel on page 7 from the case *Church of Holy Trinity v. United States* and referred to on page 6 of such memo illustrates this point. It is as follows:

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

Liability of the business interests involved for treble damages were certainly a present and live one and it cannot be conceived that during the discussion as to the liabilities of such parties to the Government under the antitrust laws, Congress, as well as such parties, did not have the possibility of such treble damage liabilities also in mind. Had this not been so, it would have been very easy for Congress to have specifically stated that the exceptions referred to in the Moratorium Act did not include situations arising under the treble damage provision. It cannot be contended that Congress acted without such possibility in mind.

C. AS TO THE LEGISLATIVE HISTORY.

We believe that what we have said before both in this and in the original reply, aside from the rules laid down in the Collett, et al. cases, have demonstrated that the act as passed is all-embracing both as to Government and private suits; in addition we might add that at the threshold of this discussion is the question as to whether the "legislative history" is the history of the particular bill or whether it is the history of the *problem* with which the legislature is concerned. Usage here is very clear. It happens habitually that bills are introduced and referred to committees for no other purpose than to provide a cause for the hearing. At the end of the hearing, the bill may be amended or an entirely new bill may be drawn. In the course of a hearing, a half dozen bills may in succession be before the legislative body. Legislative history has significance only if it is functional and really interprets the act which emerges. In respect to the suspension or antitrust actions some three or four bills were at one time or another considered, all dealing with aspects of the same thing. It is perfectly clear that the bill to exempt from the antitrust actions was before the Senate. It was likewise before the Judiciary Committee which eventually reported out the Moratorium Bill. The legislative history must be the legislative history of a bill which is only one of a number of answers which were considered. In fact, there is no legislative history for the particular bill which was passed. *The legislative history is in respect to the proposed exemption from the antitrust laws.*

The reference to Section 12 (Memo. p. 14) of the Small Business Act is quite without relevancy. That act originated in the Senate. Section 12 was tacked on by the House. Consequently it does not stand in succession to the discussion of the exemption bill in the Senate. It is in fact an independent source of origin. Section 12 was tacked on in the House before the hearings on the so-called Patterson or Suspension Bill in the Senate.

However, there are here other infirmities to be noted. Note that Section 12 is part of a Small Business Bill. It is not small

business but large business which generally speaking violates the antitrust acts. Consequently, it covered only a small area of the economy. Note, too, that Section 12 is not in the nature of an exemption but in the form of a procedure.

It is stated in the memo (p. 14) that the intention of the Moratorium statute was "to enable the government to carry out the gentleman's agreement." The answer is obvious. The gentleman's agreement was self-operating. No statute of the government was necessary to enforce it. The memo tries to make much of other actions. Note for example the footnote on page 3. The libel on the case has been invoked in only 3 or 4 cases in almost 60 years of the antitrust acts, and consequently is of no consequence. Almost all of the other types of suit referred to are follow-up actions of one sort or another. They do not have to do with the date by which the original proceeding must be begun.

There is no answer to the rationale which we put forward in our original brief. Businessmen demanded security against anti-trust suits and the threat in the private action was far greater than that in the government action. The excerpts from Secretary Patterson's testimony are here eloquent.

We respectfully submit that in view of the Collett, et al. cases no more need to have been offered in reply to the memo of counsel than the citation of such controlling precedents; the points urged by counsel in those cases in favor of a legislative interpretation are largely similar to those presented herein, but in view of the very clear wording of the present Moratorium there can be no necessity for the use of the doctrine of legislative interpretation. To permit the extension of such doctrine to the extent that counsel now alleges would be to open up in every case involving statutory wording, such investigation no matter how clear, precise and exact the wording of the statute might be.

We respectfully submit that there is no possibility of or reason for the exemption of private suits from the provisions of

the act in question and that accordingly this judgment should be reversed.

Respectfully submitted,

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